STATE OF COLORADO **Hearing: 8/26/10**
OFFICE OF ADMINISTRATIVE COURTS

W.C. No. 4-798-794
Carrier No. W09-6920-BH

RESPONDENT'S POSITION STATEMENT

In the Matter of the Workers' Compensation Claim of:

BRYAN STEWART,
Claimant,

v.

REGIONAL TRANSPORTATION DISTRICT, Employer, and SELF-INSURED, Insurer,
Respondent.

Regional Transportation District ("RTD"), the self-insured employer/respondent in this case, by its attorney, RTD Deputy General Counsel Rolf G. Asphaug, submits this position statement in connection with the August 26, 2010 hearing in this matter before Administrative Law Judge Peter J. Cannici.

As directed by the Administrative Law Judge, the position statement is submitted in the form of the following proposed Findings of Fact, Conclusions of Law, and Order:

ISSUES

1. Whether Claimant has established by a preponderance of the evidence that he suffered a compensable injury or occupational disease to his lower back and/or right hip on July 8, 2009 during the course and scope of his employment with Employer, and arising out of such employment.

2. Whether, if the claim is compensable, Claimant has demonstrated by a preponderance of the evidence that the medical treatment he received was reasonable and necessary to cure or relieve the effects of an industrial injury.

3. Whether, if the claim is compensable, care was referred or transferred by operation of law to Dr. Dunn.

FINDINGS OF FACT

1. On July 8, 2009 Claimant was working for Employer as a Signal Power Maintainer. Claimant has been employed by RTD for approximately 10 years. Claimant testified that part of his duties involved maintaining power substations for Employer's light rail vehicles. Claimant was at a power substation working on air conditioners. Part of his duties required disassembling the air conditioner and flushing it out with solvent. Claimant performs this duty about three times a month. **[Hearing Recording ("HR") 2:18.].** On July 8, 2009, Claimant had a truck with three 30-gallon barrels of water to help clean air-conditioning units. He drove the truck to an air-conditioning unit. Claimant testified at hearing that he stepped off his truck to walk to the air conditioner. When he took his second step from the truck onto his right foot he felt "a little odd." He stepped onto his left, and then when he stepped on his right foot "it was just like I'd been hit with a sledgehammer on the bottom of the hip." **[HR 1:58:20.]** At cross-examination Claimant explained further that he had already stepped off his truck and had taken two steps away from his truck when he felt the sledgehammer-type pain. He was walking on a flat, level surface, with nothing unusual about the surface. **[HR 2:08-2:09.]** He confirmed that the pain was immediate and did not get worse over time or subside.

2. Claimant limped to the office. His supervisors offered medical attention if desired; Claimant declined. The following day, Claimant went to see his personal physician, Dr. Michael Dunn. Claimant then reported an injury on July 13, 2009.

3. Claimant stated that Dr. Henry Roth's July 15, 2010 report was inaccurate in that Claimant did not feel gradual discomfort while walking around, but instead felt immediate discomfort when walking in a straight line.

4. Claimant testified that he attended the deposition of Dr. Dunn. Claimant was asked whether the facts Dr. Dunn relied upon were consistent with what Claimant had told him as to how he was injured. Claimant responded, "I don't know if he was listening when I told him how I was injured." **[HR 2:05.]**

5. Claimant testified that contrary to Dr. Dunn's February 15, 2010 report **[Claimant's Exhibits, Bates Stamp 48]**, Claimant had not "developed pain while lifting" a 30 to 40 pound toolbag, as Dr. Dunn reported. Claimant testified that Dr. Dunn was also incorrect in reporting that the initial onset of pain was minor, but that it was progressive over the next several hours: "I don't know why he came up with that." **[HR 2:08.]**

6. Claimant acknowledged that he gave a recorded statement to RTD in mid-July. The recorded statement was played at the hearing. In the recorded statement, Claimant stated that his right hip started hurting. In the recording, he stated that the pain "didn't seem like anything at first, it gradually got worse … by the end of the night it was excruciating … I didn't lift anything at the time, and thinking back on it the only thing I could have done was earlier when I loaded the truck I threw the water cans up onto the truck …" In the recorded statement, Claimant stated that he did not feel anything at the time he threw the water cans up on the truck. **[HR 2:13-15.]** The water cans were empty and weighed about 10 pounds each. **[HR 2:16.]**

7. Neither in his recorded statement nor in his testimony at hearing did the Claimant discuss pain relative to lifting a bag of tools.

8. Claimant testified that his description of the incident in the recording was accurate: "the way I felt it." **[HR 2:17.]** Asked on redirect as to the reason for the discrepancy, Claimant stated that he was in pain at the time, and that his hearing testimony about an immediate onset of pain was accurate.

9. Claimant testified that he had seen a chiropractor "fairly often" prior to July 8, 2009, for treatment for his back. **[HR 2:19.]** Records from the chiropractor were not in evidence.

10. In his deposition testimony, Dr. Dunn testified that the Claimant was first seen by a nurse practitioner at Dr. Dunn's office on July 9, 2009, and that the records reflected a report of "no discrete event or no discrete injury" and that the Claimant had already been to a chiropractor for an adjustment. **[Dunn Transcript ("Dunn Tr.") p. 6, lines 18-19.]**

11. Dr. Dunn's records reflect that he first saw the Claimant himself on July 13, 2009, and obtained a history including routine heavy lifting of up to 100 pounds **[Claimant's Exhs., Bates Stamp 13; Dunn Tr. 8, line 3].** Dr. Dunn also stated: "He does not have or recall a specific incident associated with the onset of pain. It was rather insidious … and was progressive through the shift so that he was moderately uncomfortable by the time he went off work …" **[Claimant's Exhs., Bates Stamp 13.]** Dr. Dunn concluded in his July 13, 2009 report: "This is likely work related *given the history described above*." (emphasis added). **[Claimant's Exhs., Bates Stamp 13.]**

12. In a later report dated July 31, 2009, Dr. Dunn acknowledged that the history of claimant routinely lifting up to 100 pounds was inaccurate **[Claimant's Exhs., Bates Stamp 15.]**. In his July 31 report, Dr. Dunn stated: "We reviewed the circumstances around the time of his becoming symptomatic once again. … He does not describe a discrete incident when pain was noted but rather tells me that the pain

began during the shift after he had stepped off the track and lifted his tool bag. The onset was initially minor pani and mild but was persistently progressive throughout the course of the shift so that he was considerably discomfited with pain by the time his shift ended …" **[Claimant's Exhs., Bates Stamp 15.]**

13. In a February 15, 2010 report, Dr. Dunn stated: "In my professional medical opinion, Mr. Stewart's lumbar pain syndrome occurred relative to lifting a 30 to 40-pound bag of tools …" In his testimony, Dr. Dunn added that "My understanding, the way I thought I was putting that in that note … was that lifting that tool bag was temporally related to his onset of back pain." **[Dunn Tr. 22, lines 6-10.]**

14. Asked by claimant's counsel at his deposition as to why he believed the Claimant's injury was work-related, Dr. Dunn responded in part: "My understanding had been that back injuries that become symptomatic while the patient is at work generally are considered work-related." **[Dunn Tr. 12, lines 8-10.]** "[T]his happened at work, and given my former understanding of how that statute treats back injuries in patients who work with physically challenging tasks, I believe it's a work-related injury." **[Dunn Tr. 20, lines 8-11.]**

15. Dr. Dunn also testified, "I guess I would agree with Dr. Roth's statement that there's not accumulative [sic; should be "a cumulative"] injury history here." **[Dunn Tr. 19, lines 11-13.]**

16. Dr. Dunn was asked whether his opinion as to work-relatedness would change if he had been told by the Claimant that he did not lift anything around the time he started hurting, that he was just walking around when it began to hurt, that there was nothing unusual about the surface he was walking on, that he hadn't tripped, and that he had put a couple of empty water cans weighing 10 pounds each in the back of a truck sometime before. Dr. Dunn's response was: "I hate to do this to you, but I'm just – I'm not sure." **[Dunn Tr. 22, line 18- 23, line 3.]**

17. Dr. Dunn stated that he was not aware whether the Claimant had previously treated with a chiropractor for back pain prior to being seen at Dr. Dunn's clinic. **[Dunn Tr. 26, lines 11-17.]**

18. Dr. Dunn acknowledged that prior to experiencing a pain syndrome, the Claimant had preexisting degenerative changes in his back. **[Dunn Tr. 27, lines 15-20.]** A lumbar spine x-ray report of July 13, 2009 likewise stated: "Degenerative disc disease L5-S1." **[Resp. Exh. E.]** Dr. Dunn further acknowledged that asymptomatic degenerative changes in the back can become symptomatic quickly and due to unknown factors, and that symptoms can develop not related to anything in particular that a person does. **[Dunn Tr. 29, line 6-30 line 3.]**

19. Dr. Roth testified at hearing, and his July 15, 2009 and August 4, 2010 reports were in evidence. **[Resp. Exh. A.]** In his July 15, 2009 report, Dr. Roth stated that the Claimant reported noticing discomfort while walking around at work. "There was no incident or event. Mr. Stewart notes that he assisted loading some water bottles into the back of a van. However, that activity was not associated with discomfort." **[Resp. Exh. A, p. 12.]** In addressing causation, Dr. Roth noted: "The information currently available is not sufficient for me to opine work relatedness. This is not a claim for cumulative trauma. Additionally, this is not a claim for an acute incident. Rather Mr. Stewart has the onset of discomfort while at work. That discomfort is not specifically associated with any work activity. The activity performed when the discomfort was first noticed is walking." **[Resp. Exh. A, p. 14.]**

20. Dr. Roth's August 4, 2010 report was based on further review of Dr. Dunn's medical records and testimony. Dr. Roth noted: "If I am following Dr. Dunn's reports correctly his conclusion is based on his belief that if an individual performs physical labor and has pain while at work their condition is work related. I do not concur with Dr. Dunn's understanding. As articulated Dr. Dunn's statements are overly simplistic. I do not believe the statutes nor the Low Back Pain Guidelines suggest autonomic work relatedness based on location of symptom onset. Location does not define causation." **[Resp. Exh. A, p. 1.]** (At hearing, Dr. Roth noted that "autonomic" was a typographical error and should have been "automatic." **[HR 2:28.]**

21. Dr. Roth noted in his August 4, 2010 report that the Claimant had filled out a comprehensive questionnaire on July 15, 2009, and responding to the question "Describe your work accident or how your illness began," the Claimant himself wrote: "While walking in course of work slight pain started in right hip and got worse as evening went on." **[Resp. Exh. A, p. 1.]**

22. In his deposition, while not discussing the basis and reasons for his beliefs or providing medical diagnosis or dates of onset of illness or injury, Dr. Dunn appeared to indicate that Claimant's having "work[ed] hard" might have been related to his condition. However, Dr. Dunn also noted that "Most people who are in the age group of most of the people sitting in this room, if you look at their spine x-rays, they're abnormal." **[Dunn Tr. 18, lines 18-24.]** In his August 4, 2010 report Dr. Roth discussed at length, with extensive citations to specific medical literature, the notion that there could be spinal degeneration as the result of nonspecific atraumatic materials handling. (At hearing Dr. Roth noted that the word "traumatic" in his report should be "atraumatic." **[HR 2:29.]**) Dr. Roth reported that no scientific trials have demonstrated any association of lumbar degenerative change to materials handling. "It is not reasonable to presume a relationship. A presumption of this sort is not consistent with current evidence[] based medicine." **[Resp. Exh. A, pp. 1-2.]**

23. At hearing, Dr. Roth noted that the history that both Dr. Dunn and he had obtained by Claimant of gradual onset of pain was consistent. **[HR 2:24.]** Dr. Roth reviewed the questionnaire completed by Claimant and confirmed that the Claimant had given a similar history.

24. Dr. Roth added at hearing that "there isn't much of a question anymore" that without specific trauma, physical activity does not affect degeneration of the spine. Dr. Roth testified that from a scientific point of view, location does not define causation, nor does an association define causation; and the fact that Claimant was at work did not make something he physically experienced work-related unless it was a result of something in that environment or a hazard in that environment.**[HR 2:32-34.]**

25. Dr. Roth testified that an underlying degenerative disease will ultimately become symptomatic in most persons, and you have to be doing something someplace when you first experience a symptom. **[HR 2:34-35.]**

26. Dr. Roth was asked the same question as asked to Dr. Dunn, as to whether if he had been told by the Claimant that he did not lift anything around the time he started hurting, that he was just walking around when it began to hurt, that there was nothing unusual about the surface he was walking on, that he hadn't tripped, and that he had put a couple of empty water cans weighing 10 pounds each in the back of a truck sometime before, the condition was work-related. Dr. Roth testified in response that his opinion was that the condition was not occupational, "because there's no information relating the onset of symptoms to a hazard of the environment or activities that he's performing either acutely or if you want to look at it over a long period of time. This is really this setting what I refer to as idiopathic: it's totally unique to the person, it's not a reflection of the environment, per se. No different if you were just standing there and all of a sudden clutched your chest, and you're having a heart attack. That's not a reflection of the moment or even the hour; it's really a reflection of behavior and genetics over a 63-year period." **[HR 2:36-37.]**

27. The Judge finds that, as demonstrated by the x-ray report and by the reports and testimony of the physicians in this case, the Claimant had a preexisting disease or infirmity to his low back, which was brought into the workplace.

28. The Judge finds that Claimant has failed to prove it is more probably true than not that he sustained a compensable injury on July 8, 2009. Per the Claimant's testimony at hearing, he experienced sudden, sledgehammer-like pain after taking several steps across a flat, level surface with nothing unusual about it: i.e., a ubiquitous condition. Per the Claimant's statements as reported by Drs. Dunn and Dr. Roth, as noted in Claimant's pain questionnaire to Dr. Roth, and in his recorded statement to

RTD, the Claimant had instead experienced gradual pain developing over the course of his shift, not associated with any particular work activity. The Judge finds that Claimant has failed to show more than that he had something happen to him during his employment, and has not shown how or why his condition arose out of his work.

29. The Judge finds that, to the extent that Claimant or Dr. Dunn may have suggested or argued in favor of an occupational disease, the Claimant has failed to prove it is more probably true than not that he sustained an occupational disease. In this regard, the Judge credits Dr. Roth's testimony and report regarding the lack of scientific evidence associating nonspecific, atraumatic materials handling with spinal degeneration. As a matter of fact, it is not more probably true than not that the Claimant sustained "a disease which results directly from the employment or the conditions under which work was performed, which can be seen to have followed as a natural incident of the work and as a result of the exposure occasioned by the nature of the employment, and which can be fairly traced to the employment as a proximate cause and which does not come from a hazard to which the worker would have been equally exposed outside of the employment." Section 8-40-201(14), C.R.S.

30. Evidence and inferences contrary to these findings are not credible and persuasive.

CONCLUSIONS OF LAW

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

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

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

Compensability

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

5. A claimant must prove by a preponderance of the evidence that his injury arose out of the course and scope of his employment with employer. Section 8-41-301(1)(b), C.R.S.; *see City of Boulder v. Streeb*, 706 P.2d 786 (Colo. 1985). An injury occurs "in the course of" employment where claimant demonstrates that the injury occurred within the time and place limits of his employment and during an activity that had some connection with his work-related functions. *See Triad Painting Co. v. Blair*, 812 P.2d 638 (Colo. 1991).

6. The "arise out of " requirement is narrower and requires Claimant to show a causal connection between the employment and injury such that the injury has its origins in the employee's work-related functions and is sufficiently related to those functions to be considered part of the employment contract. *See Id.* There is no presumption that an injury that occurs in the course of a worker's employment also arises out of the employment. *Finn v. Industrial Commission,* 165 Colo. 106, 437 P.2d 542 (1968); *See also Industrial Commission v. London & Lancashire Indemnity Co.,* 135 Colo. 372, 311 P.2d 705 (1957) (mere fact that the decedent fell to his death on the employer's premises did not give rise to presumption that the fall arose out of and in course of employment). Where a claimant is unable to prove more than that he had something happen to him during his employment, and he does not show how or why his condition arose out of his work, he fails to establish a prima facie case of compensability. *Finn, supra*. Additionally, it is a claimant's burden to prove by a preponderance of the evidence that there is a direct causal relationship between the employment and the injuries. Section 8-43-201, C.R.S.; *Ramsdell v, Horn,* 781 P.2d 150 (Colo.App. 1989).

7. Special rules apply in the event an injury is "precipitated" by some preexisting condition brought by a claimant to the workplace. Where the precipitating cause of an injury is a pre-existing condition suffered by a claimant, the injury is not compensable unless a "special hazard" of the employment combines with the pre-existing condition to cause or increase the degree of injury. *See National Health Laboratories v. Industrial Claim Appeals Office*, 844 P.2d 763 (Colo.App. 1992). This principle is known as the "special hazard" rule. *Ramsdell, supra*. In addition, to be considered an employment hazard for this purpose, the employment condition must not be a ubiquitous one; it must be a special hazard not generally encountered. *See Ramsdell, supra* (high scaffold constituted special employment hazard to worker who suffered epileptic seizure and fell); *Gates Rubber Co. v. Industrial Commission,* 705 P.2d 6 (Colo.App. 1985) (hard level concrete floor not special hazard because it is a condition found in many non-employment locations). The rationale for this rule is that unless a special hazard of employment increases the risk or extent of injury, an injury due to a claimant's pre-existing condition does not bear sufficient causal relationship to the employment to "arise out of" the employment. *Gates Rubber Co., supra*; *Gaskins v. Golden Automotive Group, L.L.C.,* W.C. No. 4-374-591 (August 6, 1999) (injury when pre-existing condition caused the claimant to stumble on concrete stairs not compensable because stairs were ubiquitous condition).

8. An accident must also be traceable to a definite time, place, and cause. *Martin Marietta Corp. v. Faulk*, 158 Colo. 441, 407 P.2d 348 (1965).

9. In this case, the Judge concludes that if the Claimant's hearing testimony is credited – i.e., if the Claimant sustained a sledgehammer-like pain after taking several steps along a flat, ubiquitous surface, the Claimant has failed to show that his injury arose out of the Claimant's employment. The Claimant has failed to show that a special hazard of his employment combined with the preexisting condition to cause or increase the degree of injury. Instead, per the Claimant's own testimony, the pain occurred when Claimant was walking on a flat surface: a ubiquitous condition. If instead the Claimant's statements to the doctors and in the recording are credited, the Claimant has failed to show that he sustained an injury traceable to any definite time, place or cause, or that the conditions of employment were the direct cause of the injury: the Claimant merely began experiencing gradual onset of pain while at work, not associated with any particular activity or event.

10. In addition, the differences between the descriptions given by the Claimant in court versus those given to the physicians and in his statement on multiple occasions independently lead to the conclusion that Claimant has failed to demonstrate a compensable injury by a preponderance of the evidence.

11. As found, Claimant has failed to demonstrated by a preponderance of the evidence that he suffered a compensable lower back or hip injury on July 8, 2009 during the course and scope of his employment with Employer.

12. As noted above, for a Claimant to be found to have an occupational disease compensable under the Act, Claimant must prove by a preponderance of the evidence that he has "a disease which results directly from the employment or the conditions under which work was performed, which can be seen to have followed as a natural incident of the work and as a result of the exposure occasioned by the nature of the employment, and which can be fairly traced to the employment as a proximate cause and which does not come from a hazard to which the worker would have been equally exposed outside of the employment." Section 8-40-201(14), C.R.S. Claimant has failed to establish by a preponderance of the evidence that he sustained a compensable occupational disease as defined in Section 8-40-201(14).

13. In light of the determination that the claimant failed to prove that he sustained a compensable injury or occupational disease arising out of and in the course of his employment, the Judge is not required to consider the other issues for hearing.

ORDER

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

1. The claim for workers' compensation benefits in W.C. No. 4-798-794 is denied and dismissed.

DATED: _____, 2010

_____
Peter J. Cannici
Administrative Law Judge

Respectfully submitted September 16, 2010.

REGIONAL TRANSPORTATION DISTRICT

By_____
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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of this document was served by hand delivery, email and mail this 16th day of September, 2010, addressed to:

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