IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

2002 MTWCC 64

WCC No. 2001-0398

BRADLEY BOSTER

Petitioner

vs.

LIBERTY MUTUAL FIRE INSURANCE COMPANY

Respondent/Insurer.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND JUDGMENT

Summary: Thirty-five year old high school graduate, with experience in the military, working on fishing boats, then in various heavy labor positions, hurt his back in October of 1994 while working for a company that maintains tracks for railroads. Never having returned to work, he seeks benefits for PTD, additional TTD, or PPD. Claimant was placed at MMI by three separate treating physicians. Although the insurer reinstated TTD benefits on various occasions, it finally terminated such benefits during January of 2001. He was medically released to perform light or sedentary work.

Held: Claimant is not entitled to PTD benefits where, based on review of the entire record, including review of video surveillance tapes, and observation of claimant during trial, the Court was absolutely persuaded that claimant has exaggerated his pain. Medical records from several providers suggest claimant's reports of pain do not match objective findings and/or are contradicted by activities shown on surveillance tapes. The Court agrees with a pain psychologist's assessment that claimant is unmotivated, not in discomfort, and simply comfortable with his non-working lifestyle. Further TTD benefits are denied where the claimant was placed at MMI and the only evidence even arguably supporting TTD was a physician's recommendation of additional tests, which have been done and add nothing new. While a pain clinic was previously recommended, claimant refused that treatment; his reversal at trial was not persuasive and, in any event, a pain specialist testified he was not a good candidate for pain treatment. Claimant is, however, entitled to PPD benefits based on an impairment rating and factors relating to education and loss of heavy lifting

capacity. He is not entitled to PPD benefits for wage loss where he has not proved a wage loss.

Topics:

Malingering. Claimant who has not worked since 1994 back injury not entitled to total disability benefits where Court was absolutely persuaded, based on entire record, including video surveillance tapes, and observation of claimant during trial, that claimant was exaggerating his pain, was unmotivated, and was simply comfortable with his non-working lifestyle.

Pain. Claimant who has not worked since 1994 back injury not entitled to total disability benefits where Court was absolutely persuaded, based on entire record, including video surveillance tapes, and observation of claimant during trial, that claimant was exaggerating his pain, was unmotivated, and was simply comfortable with his non-working lifestyle.

Benefits: Permanent Total Disability Benefits: Pain as Disabling. Claimant who has not worked since 1994 back injury not entitled to total disability benefits where Court was absolutely persuaded, based on entire record, including video surveillance tapes, and observation of claimant during trial, that claimant was exaggerating his pain, was unmotivated, and was simply comfortable with his non-working lifestyle.

Witnesses: Exaggeration. Claimant who has not worked since 1994 back injury not entitled to total disability benefits where Court was absolutely persuaded, based on entire record, including video surveillance tapes, and observation of claimant during trial, that claimant was exaggerating his pain, was unmotivated, and was simply comfortable with his non-working lifestyle.

Maximum Medical Improvement: MMI occurs at the point of time when further treatment is not reasonably expected to materially improve claimant's condition.

¶1 The trial in this matter was held on two days. The first day of trial was on December 17, 2001, in Missoula, Montana, where the testimony of Dr. Martin D. Cheatle was heard. On January 11, 2002, the Court reconvened in Helena, Montana, first at the office of Dr. Brooke Hunter to hear his testimony, and thereafter in the small courtroom of the Federal Building, where the remaining witnesses testified. However, the case was not submitted for decision until March 8, 2002, after the parties filed post-trial briefs and a transcript of the January 11th proceedings. At trial, petitioner, Bradley Boster (claimant), was present and

represented by Mr. John C. Doubek. Respondent, Liberty Mutual Fire Insurance Company (Liberty), was represented by Mr. Larry W. Jones.

¶2 Exhibits: Exhibits 1 through 21 were admitted at trial. In addition, the parties submitted Exhibit 22 post-trial. There were no objections to the exhibits.

¶3 Witnesses and Depositions: Martin D. Cheatle, Ph.D., Brooke Hunter, M.D., Bradley Boster, Glen Palin, Jeffrey Boster, Carrie Ann Boster, Teresa Toccafondo, Angela Palin, and Loren Hartman testified at trial. In addition, depositions of Dana M. Headapohl, M.D., and Bradley Boster (Volume II, November 26, 2001 only) were submitted for the Court's consideration.

¶4 Issues Presented: The issues as set forth in the Final Pretrial Order are:

1. Whether the termination of claimant's ttd [sic] benefits by insurer was proper.

2. Whether the claimant is temporarily totally disabled, permanently totally disabled or significantly partially disabled.

3. What benefits, if any, is claimant entitled to receive.

4. Whether claimant is entitled to an award of penalty and attorney fees against Insurer for wrongfully terminating his benefits.

¶5 Having considered the Final Pretrial Order, the testimony presented at trial, the demeanor and credibility of the witnesses, the depositions and exhibits, and the arguments of the parties, the Court makes the following:

FINDINGS OF FACT

¶6 Claimant is 35 years old. He has a high school diploma but no additional education. (Tr. at 115.)

¶7 Following graduation from high school, claimant served four years in the Army as a combat engineer, mostly building pontoon bridges and acting as a lifeguard. (Tr. at 115-16.) His job entailed heavy labor. (*Id*. at 116.)

¶8 Claimant then worked on Alaskan fishing boats off and on for three years, loading fish and operating a forklift on the boats. (*Id.* at 117; Ex. 18 at 16.) Thereafter, he returned to Helena, drew unemployment for a while, then went to work for a post and pole yard in Townsend loading logs. (*Id*. at 118; Ex. 18 at 16.) The pole yard went out of business and

on July 4, 1994, the claimant went to work for Loram Maintenance of Way, Incorporated (Loram). (Tr. at 119; Ex. 18 at 17.) Loram maintains track for railroads. (Tr. at 119.) Claimant was responsible for operating and maintaining railway maintenance equipment. (Tr. at 119; Ex. 18 at 30.) It was a heavy labor job.

¶9 On October 10, 1994, while working for Loram, claimant injured his back. (Uncontested Fact 1.)

¶10 At the time of the injury, Loram was insured by Liberty. Claimant submitted a claim for compensation and Liberty accepted the claim.

¶11 Claimant has not worked since his injury. Over the next few years following his injury, Liberty paid temporary total disability benefits. It terminated the benefits on three or four occasions but reinstated them each time except for the last time. (Tr. 182.) The last time was January 19, 2001, when Liberty gave claimant 14-day notice it was terminating his benefits. (Tr. 183.) The benefits were not reinstated following the January 19th notice; seven and a half months later the claimant filed his present petition.

¶12 Claimant contends that he is either temporarily totally disabled or permanently totally disabled. In the alternative, he contends that if he is not totally disabled then he is entitled to permanent partial disability benefits, however, he has presented no evidence of wage loss with respect to jobs he might perform.

¶13 Claimant has been treated or examined by a number of physicians over the years. His constant complaint in recent years is low-back and right leg pain. He has been released to return to light to medium jobs and jobs have been identified as available and appropriate for him. However, he insists that his pain is too great for him to work. This is a pain case resting entirely on claimant's credibility as to the nature and extent of his pain.

¶14 The first medical record is dated October 25, 1994, and is a prescription by Dr. Glen Sublette, a Butte neurologist, for physical therapy. (Ex. 13 at 88.) The prescription states that the therapy is for "L5-S1 disc." (*Id*.) It is not clear whether Dr. Sublette saw claimant that day. (*See* id.)

¶15 Dr. Sublette did examine claimant on October 26, 1994, and also conducted nerve conduction (EMG) studies. (Ex. 13 at 85-87, 89-90.) At the time of the examination claimant complained of "numbness and tingling in the buttocks and legs, and possibly some weakness in the lower extremities," as well as "radiating discomfort from the lumbar region up into the mid thoracic and cervical regions." (*Id*. at 85.) The nerve conduction studies "showed a prolongation of the distal motor latencies in both extremities," which Dr. Sublette interpreted as "consistent with a diffuse peripheral neuropathy, but also probably represents S1 radiculopathy." (*Id*. at 86.) However, the study was "limited because of the patients

[sic] discomfort." (*Id*.) Dr. Brooke Hunter, who later treated the claimant characterized Dr. Sublette's study as "technically quite flawed." (Tr. at 7.) In any event, Dr. Sublette opined that claimant "most likely has a L5-S1 disc" and recommended myelography, which the claimant refused at that time. (Ex. 13 at 86.) Claimant was to see Dr. Sublette in 7-10 days for re-evaluation but did not do so, rather his care was then assumed by Dr. Allen Weinert, a physiatrist in Helena.

¶16 Dr. Weinert treated claimant from November 10, 1994 to February 6, 1995. (Ex. 14.) Claimant was ultimately unhappy with Dr. Weinert and has stated adamantly that he will not resume treatment with him. (Ex. 16 at 130.)

¶17 On November 10, 1994, claimant reported "mid and low back pain which is variable in nature." (Ex. 14 at 114.) He reported increased low back pain when standing and occasional tingling in both feet. (*Id*.) After examining claimant, Dr. Weinert diagnosed back strain with "no evidence of neurologic compromise such as S1 radiculopathy, however, lumbar disk herniation could have occurred." (*Id*. at 116). He prescribed physical therapy and an anti-inflammatory and ordered an MRI. (*Id*.)

¶18 On November 30, 1994, Dr. Weinert reported that the MRI identified dessication of the L4-5 disk, which was also centrally bulging but with no herniation. (*Id.* at 112.) On that date claimant was reporting increased "mid-back pain," headaches and neck pain. Dr. Weinert continued to prescribe physical therapy, along with home exercises. (*Id*.)

¶19 Claimant made only limited progress in physical therapy. (*Id.* at 106.) Dr. Weinert then recommended work hardening (*id*.) and a mini-functional capacities evaluation was done in anticipation of enrolling him in the program. The mini-FCE results are noteworthy, and is one of many factors supporting my own conclusions which follow. The mini-FCE was "invalid." (*Id.* at 104.) Claimant's efforts were rated as "submaximal." (*Id*.) Dr. Weinert commented, "Various parts of the minifunctional capacity evaluation demonstrates **nonphysiologic or functional weakness** including the hand grip strength testing." (*Id*., emphasis added.) His performance was below the **first** percentile "in all categories including leg lifts, shoulder lifts, overhead lifts, carries, push, and pull, " (*id*.) this for a fellow who is six feet four inches tall and weighs over 200 pounds.

¶20 Dr. Weinert was obviously displeased with claimant's efforts and gave him two options: enroll in the work hardening program on a trial basis or be rated at maximum medical improvement (MMI). (*Id.* at 104.) Claimant agreed to the work hardening program. He lasted one day. (*Id.* at 102.) Despite being asked to lift only up to eight pounds,

> Brad did not complete his full circuit and complained of severe diffuse pain. He did not attend the second day of work hardening and has not been back

> since. Brad relates that he could not do the work hardening because he was unable to sleep the day after. He felt that the program was too difficult.

(*Id.*) Dr. Weinert then found claimant at MMI and, using his best medical judgment in light of the invalid mini-FCE, determined that claimant was capable of performing light-duty work and released him to do so, noting that he had the potential to increase beyond light duty. (*Id*. at 103.) That was the last time claimant saw Dr. Weinert.

¶21 Claimant was then referred by his attorney to Dr. Richard Dewey, a neurosurgeon in Missoula. (Ex. 8 at 46.) Dr. Dewey examined claimant on March 28, 1995, noted severe muscle spasm in the low back, and wondered whether he might have neurologic compromise." (*Id*. at 47.) He gave claimant "three simple stretches" to limber up his back and noted , "An aggressive stretching program is essential." (*Id*. at 47-48.)

¶22 Claimant returned to Dr. Dewey two months later on May 25, 1995. The doctor noted "remarkable improvement in the limberness in his spine and has gotten rid of a significant amount of back pain, buttock pain and upper thigh pain . . . . "[1] (Ex. 8 at 49.)

¶23 The improvement was short-lived. On August 9, 1995, when Dr. Dewey again saw claimant he again reported significant pain. (*Id.* at 50.) Dr. Dewey's comments at that time noted claimant's non-compliance with the stretching prescription and his doubts as to the degree and nature of his pain. Dr. Dewey wrote:

> Unfortunately, **he has been noncompliant in his exercise program**. . . [N]o findings other than restricted ROM. . . . Pain is in the back of his thigh now, not the anterior thigh. **I question whether or not that his pain is significant in that he is inconsistent in his description from times past**. He certainly has no evidence of an L4 radiculopathy. His pain is all now posterior. It goes from the leg to the buttock to the neck.

(*Id.,* emphasis added.) Dr. Dewey declared claimant at MMI and went on to say:

> Will get better only in that he spends time stretching. . . . I told Mr. Boster that it was time for him to make some moves. . . . I see no reason to continue

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[1]Dr. Dewey also noted the EMG done by Dr. Sublette suggesting neurologic involvement and commented that if claimant's leg pain persisted then "surgical decompression of the L4 nerve root" might be considered. (Ex. 8 at 49.) However, his next note of August 9, 1995, ex. 4 at 50, indicates that there was no evidence of L4 radiculopathy and subsequent imaging studies and EMGs never supported surgery. No doctor has recommended surgery.

> benefits from someone who is not assisting his own rehabilitation. . . . **I question Mr. Boster's motivation. His history is inconsistent and his compliance with an exercise program, poor.**

(*Id*., emphasis added.)

¶24 When seen by Dr. Dewey one last time a year and a half later, on January 22, 1997, claimant had not resumed his stretching program and noted muscle spasm. (*Id.* at 53.) Dr. Dewey at that time reiterated his recommendation for stretching. (*Id*.)

¶25 While treating the claimant, Dr. Dewey ordered another EMG, which was done by Dr. Cooney. Dr. Dewey wrote that the test, which was done sometime in 1995, "failed to confirm evidence of denervation, but was **suggestive of submaximal effort**." (*Id.* at 51, emphasis added.)

¶26 As with Dr. Weinert, claimant did not like the advice given him by Dr. Dewey and would not go back to him. (*See* Ex. 15 at 122 wherein Dr. Baggenstos noted that claimant "does not want to see Dr. Dewey.")

¶27 Claimant was then examined by Dr. Richard Nelson on October 3, 1995. (Ex. 11.) Claimant complained of low back and neck pain. Dr. Nelson diagnosed back sprain and "[s]econdary myofascial pain dysfunction" but wanted to rule out "discal pathology," nerve root impingement and herniated disc. (*Id*. at 79.) Claimant apparently did not return to Dr. Nelson for followup.

¶28 Then, nineteen and a half months later, claimant returned to Dr. Sublette. Dr. Sublette saw him on May 24, 1996 and on June 6, 1996, performed yet another EMG, the third for claimant. On May 24th the claimant was complaining of "pain in the right medial thigh radiating into the back of the right knee." He noted that claimant was "**not doing any exercises**." (Ex. 13 at 91, emphasis added.) The EMG was read by Dr. Sublette as indicating "continued presence of peripheral neuropathy" and "renervation[2]." (*Id.* at 93.) Dr. Hunter in a later office note characterized the "peripheral neuropathy" finding by Dr. Sublette as "almost randomly thrown out" . . . without "being expanded upon." (Ex. 16 at 124, office note of June 13, 1997.) The peripheral neuropathy diagnosis was not supported by a later EMG. (Tr. at 8.) In any event, the condition "is an inherent nerve disease **not** related to back injury." (*Id*., emphasis added.)

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[2]Probably, "reinnervation**",** which is the restoration of function especially to a denervated muscle by supplying it with nerves by regrowth or by grafting. Merriam Webster Medical Dictionary. The term is not otherwise explained in Dr. Sublette's notes.

¶29 Claimant was then referred by his attorney to Dr. Pius Baggenstos, a neurosurgeon practicing in Butte. (Ex. 15 at 119.) Dr. Baggenstos saw claimant on October 3, 1996 and November 27, 1996. Claimant's complaints were of "low back pain and pain radiating down into his right buttock area and the medial aspect of his right thigh with tingling sensation and numbness." (*Id*. at 119.) Dr. Baggenstos reviewed the 1994 and 1996 MRIs and interpreted them as showing a L4-5 herniated disc with compression of the L4 nerve root. Nonetheless, he was "reluctant to recommend surgical intervention" in light of the long duration of claimant's pain. (*Id*. at 121.) He recommended epidural blocks (*id*), which were apparently done as claimant later reported he did not get relief from them (Ex. 16 at 126). Dr. Baggenstos ruled out claimant returning to medium or heavy work (Ex. 15 at 121) but did not rule out claimant working in a light or sedentary capacity. There is no record of claimant returning to Dr. Baggenstos after November 26, 1996.

¶30 Claimant next saw Dr. Dewey on January 22, 1997, for an "independent medical examination." (Ex. 8 at 51.) It is not clear who requested the examination.

¶31 Dr. Dewey reported claimant's complaints as follows:

> He has recurrence of all of his pain, primarily in the back, buttock, medial thigh to the knee and sometimes in the foot. This is all on the right side. **The patient has a very poor description of the pain and its location**. "I guess it goes down to the front of the knee." **He has stopped all exercising. He takes medicines, I am not sure exactly which. He could not describe them.** He had epidural steroid injections which made him worse not better. They caused his back to "lock." He is taking a "pain kill" **which he cannot identify,** but does not like to take medications because they "make me addicted." . . .

(*Id*. at 51-52, emphasis added.) The bolded material contributed to my overall impression of claimant in this case.

¶32 Claimant then sought care from Dr. Brooke M. Hunter, a Helena orthopaedic surgeon. Dr. Hunter initially saw claimant on June 13, 1997, and continues to be claimant's treating physician.

¶33 On June 13, 1997, claimant reported "back pain and leg pain are virtually unchanged over the last few years" and described "leg and back pain as being approximately equal." (Ex. 16 at 123.) Claimant also reported "he is diffusely weak throughout the right leg . . . **but can't be more specific**." (*Id*.) Dr. Hunter noted that a "full accurate diagnosis of L-4, 5 lateral disc with L-4 radicular embarrassment has never been well documented according to MRI studies." (*Id*. at 124.) He recommended a CT myelogram to address the matter. (*Id*.)

¶34 On June 13th, Dr. Hunter also discussed a pain clinic with claimant and noted, "**Mr. Boster adamantly refuses this consideration as he says he cannot be expected to go out of town and leave his family for an extended period of time this way.**" (*Id.* at 124.) As to claimant working, he noted that claimant should not return his to his time-of-injury job "but feel that he probably could be doing something in the light to sedentary work as a minimum. " (*Id*. at 125.)

¶35 Pursuant to Dr. Hunter's recommendation, a CT myelogram was done on August 20, 1997. (Ex. 17.) On August 25, 1997, Dr. Hunter noted that the myelogram showed "central disc protrusion at L-4, 5 [but] none of the lateral foraminal problems worried about by prior MRIs." (Ex. 16 at 126.) He recommended against surgery and discussed other treatment options with claimant. His note of that discussion shows claimant's attitude:

> I've talked to them about all of our other options. **I mentioned pain clinic participation last visit. He adamantly defers that feeling he cannot leave town long enough to do that. I've talked to him about re-evaluation by physical medicine. He doesn't want to work with Dr. Weinert any longer. He doesn't think more physical therapy would be likely to help.** He has had epidural steroid injections and those didn't help and he doesn't think more would be reasonable.
>
> I explained to him I would be willing to work with him on any options he thinks are reasonable. He doesn't have much more for an answer. . . .

(*Id.*, emphasis added.) Dr. Hunter went on to indicate that he "suspect[ed]" with the ability to shift from "sitting to standing on a regular basis" a light or sedentary job could be entertained. (*Id*.) He also thought a further EMG would be reasonable. (*Id*. at 126.) At the end of the discussion of various alternatives, Dr. Hunter wrote, "**Mr. Boster wants to talk to his attorney and have some time to think about all of these options.**" (*Id*. at 127, emphasis added.)

¶36 Liberty then referred claimant to Dr. Henry Gary, a Missoula neurosurgeon. Dr. Gary examined claimant on October 28, 1997, and described his symptoms at that time as follows:

> Since . . . [the] time [of the industrial accident], he has had low back pain and right leg pain, never left leg pain. His right leg pain is described as pain in the right buttock, but pain on the inner surface of the right thigh radiating down to below the knee. When his pain is bad he will get pain radiating all the way down to the toes. He finds that his pain is about equal as far as back and leg. **It is worse with walking or standing. He states that he can only**

> **stand about 15-20 minutes then has to sit down. Walking on a concrete surface is limited by his estimation to less than 100 feet. On soft surfaces he can walk a little farther. All types of twisting, lifting and bending cause increased pain. If he turns sharply and exceeds his limitations, he may get severe pain that lasts for a considerable period of time and as what he states, a feeling of being locked up with inability to move much. He has tried some stretching exercises which he does not think help and in fact at times have made him worse. This is in spite of written reports from Dr. Dewey that stretching helped and when he stopped stretching he was worse.**

(Ex. 4 at 37, emphasis added.) Claimant's complaints are set out at length in light of subsequent surreptitious video surveillance.

¶37 Dr. Gary discounted Dr. Sublette's suggestion of peripheral neuropathy, noting that subsequent studies did not confirm that diagnosis and that claimant's "symptoms and findings on examination would not clinically support that type of diagnosis." (*Id*.) He also reviewed the CT scan and myelogram and did "not see any lateral extension to suggest a significant lateral disc herniation." (*Id*.)

¶38 As did Dr. Dewey, Dr. Gary recommended a stretching program for claimant which he opined would relieve claimant's back spasm. (*Id.* at 36, 39.) However, his recommendation met with resistence:

> I discussed with Mr. Boster the possibility of doing some gradual stretching exercises which I believe would help and try a regimen of a loading dose of aspirin daily taking 6-8 aspirins spaced out through the day. **He is recalcitrant to any suggestion and simply states this would not work**.
>
> **He seems to be recalcitrant to any type of suggestion otherwise and, therefore, I don't know what else to offer him**.

(*Id.* at 39.) Concerning work, Dr. Gary commented:

> He has been released at times for light duty work on two separate occasions, but never went back to work **because he didn't think he could handle that**.

(*Id*. at 38.) Despite claimant's self-assessment, Dr. Gary opined that claimant could perform a light-duty job for his time-of-injury employer. (*Id*. at 39.)

¶39 Another year passed, apparently without medical activity. Then in August 1998, Liberty sent out an investigator to conduct video surveillance of claimant. Surveillance video was taken on August 1, 2, 14, 15, 16, 23, 24, and 25, 1998.

¶40 Of significance, the video of August 2nd shows claimant helping with a large boat which is on a boat trailer. Over a period of 35 minutes he cranks the crank on the tongue of the boat to raise or lower it, gets in and out of the boat, stands up and sits down repeatedly while apparently assisting in troubleshooting the inboard motor, bends repeatedly at the waist, squats at least one time, and **lifts a child under the armpits into the air (off the ground), extending his arms while the child is in the air to lift the child up and over something before setting the child down**. (Ex, 19, Tape 8: 1:04 to 1:39 pm.; Tr. at 168-172.) In height the child appeared to come up to at least claimant's waist. (Ex. 19, Tape 8 at 1:36 pm.)

¶41 Also significant is a three minute segment on August 24, 1998, which shows claimant sliding two large appliances – a washer and dryer most likely, but possibly one is a stove – through his front door and onto a porch. (Ex. 19, Tape 11: 9:30-9:33 am.; Tr. at 175-78.) At one point claimant bends over, grabs the bottom of the first appliance, and tilts the appliance back by lifting up the bottom. At another point he reaches over the appliance, grabs the back top of the first appliance, and tilts it forward.

¶42 A day after wrestling the appliances, claimant was seen in Missoula by Martin Cheatle, Ph.D. Dr. Cheatle specializes in pain management and runs a pain management clinic which Dr. Gary characterized as "the best program to my knowledge in the area." (Ex. 3 - Gary Dep. at 19.) Dr. Cheatle summarized the claimant's complaints as of that date – August 25, 1998:

> The patient is not involved in any regular exercise and has adopted a very inactive and sedentary lifestyle.
>
> The patient stated that his pain symptoms tended to be exacerbated by sitting greater than thirty minutes; standing greater than three to five minutes; lifting waist to chest greater than ten to fifteen pounds; repetitive bending/twisting; ambulation of steps descending greater than ascending; changes in the weather and lying supine. The patient reported that his pain was relieved on a temporary basis with lying on his left side, rest in a recliner, and making frequent position changes.

(Ex. 20 at 139.) Claimant told Dr. Cheatle that he did "not perceive himself as every [sic] employable due to his perceived level of pain" and was "supine approximately sixty percent of the day." (*Id*. at 140.)

¶43 After reviewing claimant's medical records, interviewing and taking a history from claimant, and administering a test for depression, Dr. Cheatle concluded that claimant was not depressed and was simply "very content with his status quo." (*Id*. at 142.) He went on to comment:

> I suggested that the patient return for evaluations with our staff . . . to assess if he would be a reasonable candidate for pain management services which I highly doubt. **The patient was very adamant that nothing will help his condition** . . . . I believe the patient is not a good candidate for further attempts at rehabilitation given his lack of goals, his current attitude and paucity of distress. . . . I see no reason why the patient cannot return to gainful employment.

(*Id*.)

¶44 Dr. Cheatle later reviewed the videotapes, including a subsequently taken videotape at Pishkin Reservoir which will be discussed below, and testified that the videotapes merely reinforce his opinions. (*See* also Ex. 21.) He testified that claimant's lack of distress during the activities shown on videotape contrasted to claimant's pain behavior – lots of shifting, frequent alternation of sitting and standing, and facial grimaces – he observed on August 25, 1998, during his evaluation of claimant. Dr. Cheatle further testified that claimant's non-compliance with his physician's recommendations indicate his lack of motivation. He emphasized that claimant's lack of distress over his situation is a "mismatch" to his claimed disability.

¶45 Liberty conducted additional video surveillance of claimant in April and May of 1999. Of particular interest is the video of claimant on May 6, 7, and 8, 1999, showing him getting his camper ready and then at Pishkin Reservoir camping with his family. (Ex. 19, Tapes 1 and 2.) On the 6th and 7th, there is limited surveillance showing him cranking a camper leg, walking and bending, and putting things in the camper. There is video of claimant at Pishken from 4:59 pm to 5:33 pm. During that time he stands, walks, picks up a bag of ice, repeatedly squats and bends at the waist, at one point he cranks a jack leg of the trailer while squatting and at another he squats for approximately 3 continuous minutes. The video on May 8th is from 7:38 am to 9:12 am, a period of 1 hour and 34 minutes. (Ex. 19, Tape 2.) During that time claimant is standing, walking, bending over, or squatting for all but approximately 3 minutes, during which he sits. He baits his pole, casts, and goes briefly into and out of the camper a couple of times. I counted him squatting on at least 19 occasions, sometimes remaining on his haunches for several seconds. On 7 occasions he walks approximately 5 steps down a steep bank to the lake and back up again. At one point he bends over and picks up one of his children, then holds the child in his arms for approximately a minute. There is no obvious limp or difficulty in his moving about, bending over, or squatting.

¶46 Dr. Gary was asked to review the video surveillance tapes. He declined to do so but suggested Dr. Dana Headapohl do so. Dr. Headapohl, who specializes in occupational medicine, did so and testified by deposition. She reviewed various medical reports furnished by Dr. Gary and reviewed the videotapes. She was asked specifically about videos 1 and 2. She testified that his activities on the those videos were significantly inconsistent with the difficulties he reported to his physicians. (Headapohl Dep. at 13-14, 24.) In the videotapes she found no indication of any physical problems in the claimant's low back or the right leg. (*Id.* at 12.) She saw no limp or any difficulty in his walking. (*Id*.) She testified that in the videos she observed claimant displaying a full range of motion of his back except "the farthest reach of extension, arching back," and saw no observable problems. (*Id*. at 22.) A later medical record of Dr. Hunter of October 28, 1999, indicated claimant was limping and refused to try straight-leg raising because of fear it would hurt. (Ex. 16 at 128.[3]) Dr. Headapohl testified that squatting simulated straight leg raising. Claimant demonstrated no difficulty repeatedly squatting on May 8th. Dr. Headapohl also noted that patients with significant low-back and leg pain typically have difficulty going down a steep slope. (Headapohl Dep. at 21-22.) She noted no such difficulty in the videos.

¶47 After considering the videos, claimant's medical records, and job analyses, Dr. Headapohl opined that there is no "contraindication" for claimant working as a motel desk clerk and an airport pre-board screener. (*Id*. at 16-17.)

¶48 After receiving Dr. Headapohl's and Dr. Cheatle's comments about the videos, Dr. Gary wrote a letter on November 20, 2000, opining that claimant was at MMI and "able to work at a light to medium category position with restricting of lifting to infrequently 25-30 pounds and no more than 10 pounds frequently." He recommended that claimant "be able to move about every 15-20 minutes and not be required to sit for prolonged periods, stand for prolonged periods." (Ex. 22.) He also recommended that claimant not bend or twist other than occasionally, and not drive for long periods of time. (*Id*.)

¶49 At the time of Dr. Gary's letter, claimant had previously been approved by Dr. Dewey for a light-duty job with his time-of-injury employer. (Ex. 18 at 6.) A job analysis for that job indicates that it has "diversified clerical, statistical or semi-technical duties and routine **prescribed within the employees physical restrictions**." (*Id.* at 21, emphasis added.) The job description reiterates later on that duties are limited to "THE PHYSICAL RESTRICTIONS SET BY THE RELEASING PHYSICIAN." (*Id*., capitalization in the original.) The only qualification for the job was that the worker be a "Loram Employee injured during the course of employment who has been released by a physician to

[3]The Court cannot find this record in the Exhibits. However, I do note that on January 9, 2001, Dr. Hunter noted he had not seen claimant in "about 15 months" (Ex. 16 at 128), which would indicate he was seen by Dr. Hunter in about October 1999.

commence a light duty assignment." (*Id*.) Thus, this job was plainly within Dr. Dewey's restrictions, and claimant has not presented evidence to the contrary.

¶50 In December 2000, additional job analyses were submitted to Dr. Gary, who approved claimant's return to work as a motel desk clerk and frame assembler, as well as an airport pre-board screener with the comment, "Needs to be able to move about and sit intermittently." (*Id.* at 1.[4]) A vocational consultant employed by Liberty did market research disclosing that all three jobs are available in Helena and statewide in significant numbers (*id.* at 1-2) and the claimant has offered no evidence otherwise.

¶51 At present it appears that Dr. Hunter and Dr. Max Iverson, one of Dr. Hunter's partners, are claimant's treating physicians. Both doctors saw claimant in 2001.

¶52 In light of claimant's persistent pain complaints, Dr. Hunter recommended on January 9, 2001, that new imaging studies and possibly a new EMG be obtained. A new MRI was obtained on January 18, 2001. As with prior MRIs, it showed a centrally bulging disc which Dr. Iverson characterized on April 2, 2001, as "not that impressive." (Ex. 16 at 130.)

¶53 Dr. Iverson examined claimant on February 28, 2001, and April 2, 2001. In his note of the first examination he commented:

> The patient manifests a significant amount of irritability with respect to examination of the back as well attempted examination of neural involvement into the lower extremities. **The objective findings do not support the amount of subjective complaints that the patient rendering.**

(*Id.* at 129, emphasis added.) In his note for the second examination, Dr. Iverson commented that claimant had "**poor pain tolerance even on trivial evaluation**" and again noted that his subjective complaints were "**out of proportion to any objective findings**." (*Id*. at 130, emphasis added.)

¶54 Dr. Hunter testified at trial. He testified that claimant's history, imaging, and EMG studies presented a confusing history. Whereas, some EMG studies indicated L5-S1 involvement, claimant's imaging studies did not; and, while imaging studies indicated a

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[4]As with some other documentation, e.g., Dr. Hunter's October 1999 office note (see Fn. 3), the Court does not have the approved job descriptions. The information regarding approval is from a vocational consultant's report. That information was not objected to or challenged by claimant at trial.

bulging disc at L4-5, claimant's subjective complaints did not fit a L4-5 impingement. (See e.g., Tr. at 6-10.) Dr. Hunter probably put it best when he said:

> When I started taking care of Mr. Boster, this [the cause of his symptoms] was the uncertainty. I mean, he'd been looked at and looked at and looked at and **nobody could make the subjective complaints fit with the objective problems. Everybody kept chasing down the subjective complaints and it really is like the blind man and the elephant type of thing, everybody was taking best guess for trying to patch this together** because it didn't fit a standard course.

(*Id*. at 11, emphasis added.) Dr. Hunter talked about the "big picture":

> **The big picture is the fact that there has been a great preponderance of subjective complaints not verified with objective findings, there is a real obvious psychological overlay component to this**. . . .

(*Id*. at 16, emphasis added.) He noted that the finding that the bulging disc at L4-5 was worse in the 2001 MRI imaging was insignificant and could have been a daily variation or merely the result of a different MRI technique. (*Id*. at 19.) As to the 2001 EMG, he noted that it was so technically flawed that its suggestion of S1 nerve involvement was only a "may be" and even then it "doesn't necessarily fit with disc injury, [and] **it certainly doesn't fit** with his subjective complaints." (*Id.* at 22-23, emphasis added.)

¶55 When asked the cause of claimant's pain, he indicated that claimant probably began with a "disc injury or an exacerbation of a disc that was already starting to degenerate" and probably has some component of discogenic pain; he has myofascitis (muscle pain); and perhaps S1 or S2 nerve root irritation which "doesn't fit well with anything else." (*Id*. at 25-26.) He was asked if claimant was exaggerating his pain and was unable to express an opinion because pain is subjective, but he did note that claimant had a "**very hyperactive response to stimulus**." (*Id.* at 26, emphasis added.)

¶56 Dr. Hunter did not review the surveillance tapes (tr. 64), but of some significance to my evaluation of those tapes, Dr. Hunter testified that given claimant's complaints he should have difficulty "with stooping and squatting and bending." (Tr. at 62.)

¶57 As to claimant's ability to work, Dr. Hunter testified that "I think light and sedentary type of work is doable." (Tr. at 31.)

¶58 The only current suggestion for further treatment offered by Dr. Hunter is for claimant to return to a physiatrist or a pain clinic. (Tr. at 65-67.)

Resolution

¶59 Claimant has been found at MMI by three physician's who have treated him, by Dr. Allen Weinert back on February 6, 1995 (Ex. 14 at 103); by Dr. Richard Dewey on August 9, 1995 (Ex. 8 at 50); by Dr. Hunter on August 25, 1997 (Ex. 16 at 126); and by Dr. Gary, initially on October 28, 1997,[5] and again on November 20, 2000 (Ex. 22). Drs. Dewey, Gary, and Hunter have indicated that from a medical standpoint the claimant is capable of performing sedentary and light jobs, at minimum, and in late 2000 Dr. Gary approved specific jobs which are available in the Helena and Montana job market.

¶60 Claimant's evidence that he should still be deemed temporarily totally disabled is based on Dr. Hunter's recommendations for a further MRI and EMG, which have since been done, and his suggestion that claimant return to treat with a physiatrist (a specialist in physical and rehabilitation medicine) or a pain clinic. At trial claimant indicated that he now is willing to attend a pain clinic.

¶61 I am absolutely persuaded that the claimant has exaggerated and continues to exaggerate his pain. I did not find his testimony as to the level of his pain credible. My conclusion is based on my assessment of claimant's credibility at trial, including my personal observation of his pain behavior during trial. Testimony was initially taken of Dr. Hunter at his office. Claimant was present. I noted early on that claimant was constantly changing positions as if uncomfortable or in pain. His "restlessness" continued throughout much of Dr. Hunter's testimony. Yet, when the Court reconvened at the Federal Building and I observed him for several minutes prior to reconvening, he appeared relaxed and comfortable, not changing positions constantly in contrast to his behavior at Dr. Hunter's office. When trial began again, he again engaged in what is best termed as "pain behavior."

¶62 Moreover, I have reviewed the surveillance tapes. As did Drs. Headapohl and Cheatle, I found that his actions on those tapes, particularly his moving of the washer and dryer and his activities while fishing at Pishkin Reservoir simply do not square with the level of pain he claims in this case and which he has continuously claimed in his reports to his

[5]On October 28, 1997, Dr. Gary wrote that claimant was not at MMI but then stated that since the claimant was unwilling to follow his recommendations, "I don't know what else to offer him." (Ex. 43 at 39.) Since there was no treatment offered by Dr. Gary which claimant was willing to follow through with, Dr. Gary's note in essence finds him at MMI.

physicians. His lifting of the washer or dryer and his multiple squats during an hour and a half at Pishkin Reservoir are just too much to ignore. I am unpersuaded by the argument that he was just having "good days." I am persuaded by Dr. Cheatle's testimony that he is unmotivated and simply comfortable with his current lifestyle, I am persuaded he is consciously exaggerating his pain.

¶63 Claimant's refusal to comply with recommendations for stretching, his out-of-hand rejection of a pain clinic when initially suggested by Dr. Hunter, his refusal to consider returning to Dr. Weinert or do additional physical therapy, his performance on the mini-FCE, which incredibly placed him in the one percentile on all measures, and his consistent attitude that he cannot work and will not even try, reinforce my conclusion that claimant is consciously exaggerating his pain. His own doctors have declared that his subjective complaints do not correlate with his objective findings and characterized them as out of proportion with the objective findings.

¶64 Claimant's family was paraded before the Court to testify how bad off the claimant is, but I am unpersuaded by their testimony. Perhaps they have been taken in by claimant's claims of pain and disability -- they most certainly appear to be enabling him -- but I am not.

¶65 I find that claimant was at MMI when his benefits were cut off in January 2001, and that he has continued to be at MMI. The additional MRI imaging and EMG testing recommended by Dr. Hunter, and actually done, was driven by and responsive to claimant's continued complaints of extreme, disabling pain, which I have found were exaggerated. They produced no new findings. Claimant has been tested ad nauseam. He has had his physicians metaphorically "chasing their own tails." So long as claimant exaggerates his pain it is unlikely further testing is going to produce any helpful information.

¶66 As to Dr. Hunter's suggestion of further care by a physiatrist, claimant has rejected a return to Dr. Weinert, has rejected recommendations for further physical therapy, and refuses to do stretching exercises. I am unpersuaded he will suddenly become compliant. As to the pain clinic recommendation, claimant has flatly and unequivocally rejected that option in the past, and I do not believe him when he says that he has had a change of heart. Moreover, I find credible Dr. Cheatle's testimony that claimant is not a candidate for a pain clinic.

¶67 For similar reasons, I find that claimant is capable of working at jobs identified as appropriate for him, which are available in significant numbers, and for which he has been medically released. His problem is not that he is unable to work; it is that he is unmotivated and unwilling to work.

¶68 As to the request for permanent partial disability benefits, I find initially that he is entitled to a 10% impairment award based on Dr. Gary's impairment rating. (Ex. 22.) In addition, I am persuaded he cannot return to heavy labor since I believe he has "some" pain and also note that he does have disc disease, however, I am not persuaded that he cannot do medium labor. The burden of persuasion is on him and the release to light and sedentary work was a minimum. Since he has made it impossible to accurately evaluate his physical abilities, he has not carried his burden of showing that is all he can do. Finally, he has presented no vocational evidence showing that the jobs he can do post-injury pay less than his time-of-injury job, although I suspect that is the case.

¶69 Finally, I consider the request for a penalty and attorney fees. An award of either requires proof that the insurer has acted unreasonably. §§ 39-71-611, -612, and -2907, MCA (1993). As a matter of fact, and as illustrated by the foregoing findings of fact, the insurer acted reasonably in terminating claimant's benefits and in resisting his request for reinstatement for total disability benefits. As to my conclusion that claimant is entitled to permanent partial disability benefits, those benefits have never been at the forefront of this case. Claimant has been actively seeking TTD or PTD benefits, not PPD benefits. The PPD benefits request is only a secondary position and one that kicks in only because the claimant's request for total disability benefits is denied. Thus, it can hardly be said that the insurer has unreasonably delayed or failed to pay those benefits even though I find they are due.

CONCLUSIONS OF LAW

¶70 This case is governed by the 1993 version of the Montana Workers' Compensation Act since that was the law in effect at the time of the claimant's industrial accident. *Buckman v. Montana Deaconess Hospital,* 224 Mont. 318, 321, 730 P.2d 380, 382 (1986).

¶71 Claimant bears the burden of proving by a preponderance of the evidence that he is entitled to the benefits he seeks. *Ricks v. Teslow Consolidated,* 162 Mont. 469, 512 P.2d 1304 (1973); *Dumont v. Wicken Bros. Construction Co.*, 183 Mont. 190, 598 P.2d 1099 (1979).

¶72 Temporary total disability benefits are governed by section 39-71-701, MCA (1993). Those benefits are payable only so long as " the worker suffers a total loss of wages as a result of an injury and until the worker reaches maximum healing." Maximum healing, as defined in section 39-71-116(14), MCA, "means a point in the healing process when further material improvement would not be reasonably expected from primary medical treatment." "Primary medical treatment" is "treatment prescribed by a treating physician, for conditions resulting from the injury, necessary for achieving medical stability." Under these definitions, maximum healing occurs at the point of time when further treatment cannot be reasonably expected to materially improve claimant's condition.

¶73 I have found as fact that as of January 19, 2001, there was no reasonable expectation that further treatment will materially improve claimant's condition. In part that finding is based on my further finding that claimant is exaggerating his pain, thus vitiating the recommendations for further testing. It is also based on claimant's non-compliance with recommended treatment. By that time, and surely long before that time, there was no treatment recommendation which claimant would have accepted and followed.

¶74 Moreover, any wage loss claimant suffered thereafter was not due to an inability to work but rather to his unwillingness to work. Thus, the other requirement for continuation of TTD benefits is not met.

¶75 Claimant's request for PTD benefits is governed by section 39-71-702, MCA (1993), which limits permanently total disability benefits to permanently totally disabled workers. Permanent total disability is defined in section 39-71-116(19), MCA, as follows:

> 19) "Permanent total disability" means a condition resulting from injury as defined in this chapter, after a worker reaches maximum medical healing, in which a worker does not have a reasonable prospect of physically performing regular employment. Regular employment means work on a recurring basis performed for remuneration in a trade, business, profession, or other occupation in this state. Lack of immediate job openings is not a factor to be considered in determining if a worker is permanently totally disabled.

As previously found, claimant is at MMI. I am unpersuaded that claimant has a reasonable prospect of physically performing regular employment. He has been released for work in light and sedentary positions. He has been medically approved for jobs as a motel desk clerk, an airport screener, and frame assembler. Those jobs are available in Montana in significant numbers. I therefore conclude that claimant is not permanently totally disabled, therefore he is not entitled to PTD benefits.

¶76 I therefore consider whether claimant is entitled to PPD benefits. "Permanent partial disability" is defined in section 39-71-116(18), MCA (1993), as follows.

> (18) "Permanent partial disability" means a condition, after a worker has reached maximum medical healing, in which a worker:
>
> (a) has a medically determined physical restriction as a result of an injury as defined in 39-71-119; and
>
> (b) is able to return to work in some capacity but the physical restriction impairs the worker's ability to work.

No physician has approved claimant to return to his time-of-injury job or heavy labor. He has been physically restricted from heavy labor. Since, as I have concluded above, he is able to return to work in some capacity, he meets the definition of a permanently partially disabled worker.

¶77 Permanent partial disability benefits are governed by section 39-71-703, MCA (1993), which provides as follows:

> **39-71-703. Compensation for permanent partial disability.** (1) If an injured worker suffers a permanent partial disability and is no longer entitled to temporary total or permanent total disability benefits, the worker is entitled to a permanent partial disability award.
>
> (2) The permanent partial disability award must be arrived at by multiplying the percentage arrived at through the calculation provided in subsection (3) by 350 weeks.
>
> (3) An award granted an injured worker may not exceed a permanent partial disability rating of 100%. The criteria for the rating of disability must be calculated using the medical impairment rating as determined by the latest edition of the American medical association Guides to the Evaluation of Permanent Impairment. The percentage to be used in subsection (2) must be determined by adding the following applicable percentages to the impairment rating:
>
> (a) if the claimant is 30 years of age or younger at the time of injury, 0%; if the claimant is over 30 years of age but under 56 years of age at the time of injury, 2%; and if the claimant is 56 years of age or older at the time of injury, 3%;
>
> (b) for a worker who has completed less than 9 years of education, 3%; for a worker who has completed 9 through 12 years of education or who has received a graduate equivalency diploma, 2%; for a worker who has completed more than 12 years of education, 0%;
>
> (c) if a worker has no wage loss as a result of the industrial injury, 0%; if a worker has an actual wage loss of $2 or less an hour as a result of the industrial injury, 10%; if a worker has an actual wage loss of more than $2 an hour as a result of the industrial injury, 20%; and
>
> (d) if a worker, at the time of the injury, was performing heavy labor activity and after the injury the worker can perform only light or sedentary labor activity, 20%; if a worker, at the time of injury, was performing heavy labor activity and after the injury the worker can perform only medium labor activity, 15%; if a worker was performing medium labor activity at the time of the injury and after the injury the worker can perform only light or sedentary labor activity, 10%.

(4) The weekly benefit rate for permanent partial disability is 66 2/3% of the wages received at the time of injury, but the rate may not exceed one-half the state's average weekly wage. The weekly benefit amount established for an injured worker may not be changed by a subsequent adjustment in the state's average weekly wage for future fiscal years.

(5) If a worker suffers a subsequent compensable injury or injuries to the same part of the body, the award payable for the subsequent injury may not duplicate any amounts paid for the previous injury or injuries.

(6) As used in this section:

(a) "heavy labor activity" means the ability to lift over 50 pounds occasionally or up to 50 pounds frequently;

(b) "medium labor activity" means the ability to lift up to 50 pounds occasionally or up to 25 pounds frequently;

(c) "light labor activity" means the ability to lift up to 25 pounds occasionally or up to 10 pounds frequently; and

(d) "sedentary labor activity" means the ability to lift up to 10 pounds occasionally or up to 5 pounds frequently.

Initially, claimant has an impairment rating of 10%, thus that amount must be included in calculating his benefits. He was under 30 years old when injured, thus he is not entitled to an award based on age. Since he has completed high school but no post-secondary education, he is entitled to 2% for the education factor. Since he has not proved a wage loss, he is not entitled to anything for that factor despite the fact that the Court “suspects” he has a wage loss. Finally, he is entitled to a 15% award for reduction in labor capacity. While he has made it impossible to determine whether he can do medium labor, I am satisfied that he cannot do heavy labor, which he was doing when injured. The total of the percentages is 27%. I assume counsel can make the necessary benefit calculations.

¶78 Since both an award of attorney fees and a penalty require proof that the insurer acted unreasonably, §§ 39-71-611, -612, -2907, MCA, and I have found as a matter of fact that it did not, claimant is not entitled to either.

JUDGMENT

¶79 The claimant is not entitled to any further temporary total disability benefits or to permanent total disability benefits.

¶80 Claimant is entitled to a 27% award of permanent partial disability benefits. The Court retains jurisdiction to determine the actual amount due in the event the parties are unable to agree on the amount.

¶81 Claimant is entitled to his costs and shall file his memorandum of costs in accordance with Court rules.

¶82 Claimant is not entitled to attorney fees or a penalty.

¶83 This JUDGMENT is certified as final for purposes of appeal.

¶84 Any party to this dispute may have twenty days in which to request a rehearing from these Findings of Fact, Conclusions of Law and Judgment.

DATED in Helena, Montana, this 19th day of December, 2002.

(SEAL)

/s/ MIKE McCARTER
JUDGE

c: Mr. John C. Doubek
Mr. Larry W. Jones
Submitted: March 8, 2002