

IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

1996 MTWCC 13

WCC No. 9407-7089

EBI/ORION GROUP
(Connecticut Indemnity)

Petitioner

vs.

MICHAEL S. BLYTHE
Respondent/Claimant.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND JUDGMENT

Summary: Certified respiratory therapy technician was stuck by a needle that had just been used to draw blood from an HIV infected patient. In the years since, claimant has not tested positive for HIV, and while there is no reasonable prospect that he was infected by the needle stick, he claims that the incident caused disabling psychosis and depression.

Held: Claimant has fabricated and feigned mental illness in an attempt to advance his legal claims. He is not physically or psychologically disabled on account of the accident. **Note:** In *EBI/Orion Group v. Blythe*, 281 Mont. 50, 931 P.2d 38 (1997), the Supreme Court reversed and remanded for the WCC to exclude evidence by a psychologist who performed an IME and to reevaluate the evidence without the psychologist's testimony.

Introduction

The petitioner, EBI/Orion Group, is a workers' compensation insurer which insured Community Medical Center (Community) in Missoula on January 29, 1989. On that date the respondent, Michael Blythe (claimant), who was working as a certified respiratory therapy technician at Community, was stuck by a needle which had just been used to draw blood from an AIDS infected patient. (*The incident will be referred to as the "incident" or the "needle stick."*) In the years since, claimant has not tested positive for the HIV virus, and there is no reasonable prospect that he was infected by the needle stick. However, he claims that the incident precipitated disabling psychosis and depression.

EBI/Orion seeks a determination that the incident did not trigger mental illness and that claimant is neither permanently totally nor permanently partially disabled as a result of the

incident. In his response the claimant cross-petitions for a determination that he is suffering from a disabling mental condition which was caused by the incident. He asks the Court to determine the nature and extent of EBI/Orion's liability for compensation and medical benefits.

Nature of Issue

Claimant asserts that he suffers from psychosis and depression triggered by the incident. He claims he has auditory and visual hallucinations which have affected his ability to concentrate and work. EBI/Orion asserts that claimant's psychosis is malingering, i.e., he is faking mental illness in order to obtain monetary compensation on account of the incident. If claimant is malingering, then his claim for compensation and medical benefits fails.

Trial

The case came on for trial in Missoula on July 10, 1995. The trial lasted three days. The trial transcript spans 857 pages.

EBI/Orion was represented by Mr. Charles E. McNeil and Mr. Steven S. Carey. Claimant was personally present during the trial and was represented by Mr. Richard R. Buley. Counsel for both parties were well prepared and did outstanding jobs in presenting their cases. Their professionalism, and the outstanding experts who testified, made this trial the most interesting and riveting case over which I have presided.

Exhibits: Exhibits 1 through 9, 11 through 17, pages 1 through 5 and 20 through 22 of Exhibit 19, and Exhibits 20 through 22 were admitted into evidence. Exhibits 10 and 18 were withdrawn. Pages 6 through 16 of Exhibit 19 were refused.

Depositions: Two depositions of claimant and two depositions of William Stratford, M.D., were submitted to the Court for its consideration. In addition, the parties submitted depositions of Julie Gerberding, M.D., Sarah M. Baxter, Ph.D., Herman A. Walters, Ph.D., Sally Gauer, Ann Frazier, David Faust, Ph.D. and Richard Rogers, Ph.D. Dr. Stratford's first deposition taken March 30, 1995, will be referred to as "Stratford Dep. I" and his second deposition taken June 7, 1995, as "Stratford Dep. II." Claimant's first deposition of September 1, 1994, will be referred to as "Blythe Dep. I," and his second deposition taken June 2, 1995, as "Blythe Dep. II."

Witnesses: The following individuals testified at trial: Michael S. Blythe, William Stratford, M.D., David Faust, Ph.D., Meridee Lieberg, Kaylin Ward, Gail Hay, William R. Goodrich, Richard Rogers, Ph.D., Ron Simpson, William Triggs, Katherine Spealman and Herman A. Walters, Ph.D.

Proposed Findings and Conclusions: The Court permitted both parties to file post-trial proposed findings of fact and conclusions of law. They were filed September 5, 1995, at which time the case was deemed submitted.

Having considered all of the evidence in this case, including the exhibits, depositions, and trial testimony, the demeanor and credibility of the witnesses, and the arguments of the parties, the Court makes the following:

FINDINGS OF FACT

The Claimant

1. Claimant is 46 years old. (Ex. 1.) He has been married and divorced twice. (Tr. at 167.)
2. He fancies himself as an intellectual. He has told psychologists and psychiatrists that his IQ is between 131 and 135 and in the third standard deviation. (Tr. at 104, 124.) He claims to have a library of 50,000 books. (Tr. at 136.) He testified that he has six college degrees and is only a few credits short of two additional degrees. (Tr. at 66.) He is a perpetual student. (Tr. at 69-70.)
3. His college course work included courses in psychology. During the spring semester of 1985, he took an introductory course in clinical psychology. (Ex. 4 at 2.) In the winter and spring quarters of 1987 he took six different psychology courses. (*Id.*) In the fall of 1987 and the winter and spring of 1988 he took ten psychology courses. In the fall of 1988 and winter and spring of 1989 he took four psychology courses. (Ex. 4 at 2-3.) In June 1989 the University of Montana conferred upon him a bachelor's degree with a major in psychology. (Ex. 4 at 3.) When he was asked by Sarah Baxter, Ph.D., on October 25, 1989, to interpret Rorschach cards, he commented that he had previously seen all the cards and discussed them in one of his classes. (Ex. 2-45.)
4. Claimant is a certified respiratory therapy technician and has worked for 20 years as a respiratory therapist. He was also certified as a physician's assistant in the early 1970s. (Tr. at 645-46.)
5. EBI/Orion presented records and testimony indicating that during his childhood and teenage years the claimant engaged in some criminal activities and had seen a psychologist or psychiatrist. It also presented evidence that in 1971 he lied in order to obtain a discharge from the Navy. I have given no weight whatsoever to this evidence since it is remote in time and there is no similar evidence for the nearly 20 years that followed.

Employment By Community Medical Center

6. Claimant was employed as a respiratory therapist at Community from 1979 through March 19, 1991. (Ex. 14 at 12, 162.)

The Industrial Accident

7. On January 29, 1989, claimant stuck himself with a needle from an arterial blood gas kit which had just been used to draw arterial blood from a patient infected with AIDS. The needle stick caused him to bleed. He self-treated his wound with bleach, then sought

treatment in Community Medical Center's Emergency Room. (Tr. at 50-64, 742-43.) He was visibly shaken by the incident. (*Id.* at 743.)

Claim For Compensation

8. At the time of the accident, Community Medical Center was insured by EBI/Orion.

9. Claimant filed a claim for compensation. (Ex. 1.)

10. EBI/Orion accepted liability for the claim.

Other Lawsuits

11. Claimant has pursued other claims arising out of the January 1989 incident. He filed a civil action against the manufacturer of the arterial blood gas kit (Radiometer), Community, and his supervisor. The action was dismissed and the dismissal was affirmed on appeal in *Blythe v. Radiometer*, 262 Mont. 464, 866 P.2d 218 (1993). Dismissal of the action has no preclusive effect in this case.

Physical Consequences Of The Injury

12. Claimant suffered no permanent physical consequences on account of his injury. The puncture wound healed without incident. Claimant has consistently tested negative for the HIV virus (Blythe Dep. I at 48-49), and the uncontradicted expert medical testimony of Julie L. Gerberding, M.D. who specializes in HIV transmission, shows that an HIV infection would have appeared within three to six months after the needle stick (Gerberding Dep. at 10-11). At the time of trial, claimant was six years post-needle stick and still HIV negative. There is no credible evidence that he continues to be at risk for HIV and AIDS from the needle stick. Further, he does not have any reasonable fear of actually contracting HIV or AIDS as a result of the needle stick.

Claimant's Allegations Concerning Psychological Consequences Of The Injury

13. While suffering no permanent physical harm from the 1989 incident, claimant contends that he has suffered disabling psychological harm. He alleges that within weeks of the incident he experienced panic attacks. (Ex. 17-17 through 17-19.) He alleges that he became severely depressed and anxious. He alleges that he then began having auditory and visual hallucinations. All of this, he claims, led to a loss of interest in life, abandonment or reduction of his lifelong pursuits of physical fitness and education, an inability to work, inattention to housekeeping, and prolonged periods of sleep.

14. The issue squarely presented to the Court for decision in this case is whether his symptoms and disability are real or fabricated.

15. Four expert witnesses testified at trial. One additional expert testified by deposition. They were:

a. Dr. William Stratford, who treated claimant for his alleged mental illness, is a well known and respected Montana psychiatrist. He has done a multitude of forensic examinations and, from the Court's own knowledge, has testified in numerous court proceedings. Based on the office notes kept on Mr. Blythe, he is also a poor record keeper, a fact which resulted in his inability to recall many specifics of the case and which complicates my evaluation of his testimony.

b. Sarah Baxter, Ph.D. is a clinical psychologist practicing in Missoula. At Dr. Stratford's request, she performed psychological testing on claimant on October 25, 1989.

c. Herman Walters, Ph.D., is a respected Missoula psychologist who maintains a clinical practice and also teaches at the University of Montana. At Dr. Stratford's request, Dr. Walters interviewed and tested the claimant during the summer of 1992.

d. David Faust, Ph.D., is a professor of psychology at the University of Rhode Island. (Ex. 8 at 1-2.) He is a diplomate of the American Board of Assessment Psychology and has written or contributed to numerous articles and books. (*Id.* and Tr. at 483.) His publications include articles on malingering. (Tr. at 483.) Dr. Faust reviewed the results of claimant's psychological tests and other materials pertaining to the claimant. (Tr. at 488.) He did not personally examine the claimant, although he did observe claimant's trial testimony.

e. Richard Rogers, Ph.D., is a well-known and respected psychologist and an expert in malingering of mental illness. (Tr. at 220; Stratford Dep. II at 5-6, 20.) He is a professor of Psychology and the Director of Clinical Training at the University of North Texas. (Tr. at 660.) He is certified in forensic psychology by the American Board of Forensic Psychology. (Ex. 7-3.) In 1990 he received the Manfred S. Guttmacher Award from the American Psychiatric Association for his book *Clinical Assessment of Malingering and Deception* for outstanding contribution to forensic psychiatry and in 1992 he received an Amicus Award from the American Academy of Psychiatry and Law for distinguished contributions to the Academy and forensic psychiatry. (Ex. 7-2; Tr. at 662.) He has written more than 80 articles which have been published or accepted for publication. (Tr. at 661.) Dr. Rogers has performed numerous forensic examinations and has testified in approximately 60 cases, both civil and criminal. When asked about Dr. Rogers, Dr. Stratford said that Dr. Rogers is "one of the best people probably in the country . . . generally well thought of." (Stratford Dep. II at 5-6.) Stratford felt that an independent examination of claimant by Dr. Rogers was an "excellent idea." (*Id.* at 6.)

Claimant's Evidence

16. Claimant's case for psychological disability is built principally on his own testimony, his contemporaneous reports to others concerning his symptoms, the testimony of friends and associates tending to corroborate his claim of a psychological decline, and the testimony of Dr. Stratford.

17. For many years claimant has kept a diary. The diary consists of a daily appointment calendar in which claimant entered his appointments and errands, along with significant events occurring during the day.

18. Claimant claims, and testified, that shortly after the needle stick he began experiencing "sleep disturbances" and "panic attacks," then later on depression, and finally hallucinations.

a. On February 1, 1989, three days after the incident, he recorded "sleep disturbances" in his diary. (Ex. 17 at 15.) On February 7, 1989, he recorded a "panic attack" and a pulse rate of 120. (*Id.* at 17.) Later in February, and thereafter in March, he consulted with a hospital psychologist concerning his "anxiety attacks." (*Id.* at 22, 26.) Interestingly, claimant's diary entries in February and March of 1989 reflect that he was taking a college class in the "psychology of stress." (*Id.* at 15-24.)

b. By June 1989, he was recording depression. (*Id.* at 52.) In August and September of 1989 his diary notes concerning depression increased. (*Id.* at 68, 75-76, 82.) On September 15, 1989, he recorded that he didn't know "who the person is who is looking out of my eyes" and further expressed the thought, "I don't care about anything any more not even my own life." (*Id.* at 81.)

c. On September 21, 1989, he recorded that he had been to see Dr. Cone, who was treating him for preexisting neck pain, and told Dr. Cone that he was having depression and "apparent manic episodes." (*Id.* at 83.)

d. On September 28, 1989, claimant mentioned hallucinations for the first time in his diary entries. (Ex. 17 at 85.) His entry refers to a conversation he had that day with Michael Biggins, his supervisor at Community. According to his diary entry, claimant told Biggins about some of the symptoms that i had been having, i.e., the manic episodes (i came into work last night overwhelmed c [with] anxiety for instance -- i told him i come to work like this quite often); Also, *auditory hallucinations S/A music & people speaking in low tones.*

(*Id.*; italics added for emphasis.) His note further indicates that he had already set up an appointment with Dr. Stratford for October 2, 1989, and states that he asked Biggins "about taking long term sick leave if in fact Dr. Stratford thinks it would be appropriate." (*Id.*)

19. On October 2, 1989, claimant saw Dr. Stratford. He told Dr. Stratford that three and a half years previous he had had panic attacks over his ex-wife; he then reported that he had

experienced new panic attacks following the needle stick. (Stratford Dep. I at 62; Ex. 2-81.) He further reported that he had also experienced manic attacks, depression, and increased compulsivity, and that "30 days after stuck with needle, [he] started hearing voices, low tones, both male and female." (Stratford Dep. I at 63; Ex. 2-81.) Claimant talked and acted so irrationally that Dr. Stratford described him as being extremely despondent and "bizarre, fragmented, angry and [with] paranoid elements." (Tr. at 328.) He characterized claimant as "wild-eyed, **floridly nuts**, extremely psychotic." (Tr. at 189, emphasis added.)

20. Dr. Stratford immediately took claimant off work "for at least 6 weeks." (Ex. 14-78.)

21. On October 5, 1989, claimant called Biggins to tell him of Dr. Stratford's advice. In his diary claimant wrote:

[A]sk for an additional 2 wks so that i could see my parents at Thanksgiving. I requested to return the 1st wk in Dec. 1989. Michael agreed that this would be o.k.

(Ex. 17-87.)

22. Dr. Stratford sent claimant to Sarah Baxter, Ph.D., for psychological testing, which occurred on October 25, 1989. (Ex. 2-39 to 2-41.) Following the testing Dr. Baxter told Dr. Stratford that claimant had acted "very bizarrely" and had frightened her. (Tr. at 329.)

23. Over the next six years, Dr. Stratford prescribed various psychotropic drugs, including Zoloft, Tranxene, Lithium, Haldol, Thorazine, Ascendin, Cogentin, Novane, Prozac, Xanax, Pamelor, Triavil, and Norflec. (See Dr. Stratford's various office notes found at Ex. 2-81 to 2-154.) Blood tests for Lithium levels confirmed that claimant was taking the Lithium. However, Dr. Stratford's belief that claimant took the other prescribed drugs was based on claimant's reports rather than any independent verification. (Tr. at 412-13.) He did note, however, that side effects reported by claimant were consistent with known side effects of the prescribed medications. (Tr. at 315.)

24. At the time of trial, Dr. Stratford had prescribed Lithium, Zoloft and Tranxene. (Tr. at 424-25.) The Court asked the doctor what affect those drugs would have on a non-mentally ill individual. He replied that other than possible fatigue and drowsiness they would have no affect on a normal person. (*Id.*)

25. Since October 1989 claimant has continued to report hallucinations. He has reported auditory, visual and, probably, gustatory (taste) hallucinations.

a. At various times, he reported to Dr. Stratford of hearing:

(1) Easy listening music. (10/01/89) (Stratford Dep. I at 71; Ex. 2-84 to 2-85.)

(2) Whispering, synthesizer sounds, and religious voices. (4/10/91) (Stratford Dep. I at 89; Ex. 2-94.)

- (3) Tone inflections, music, a train coming down the tracks, metallic grinding sounds, and a doorbell ringing. (5/13/91) (Stratford Dep. I at 91; Ex. 2-95.)
- (4) Grinding metallic music changing to beautiful music. (12/4/91) (Stratford Dep. I at 95; Ex. 2-98.)
- (5) "The voice of God saying that time is short." (12/5/91) (Ex. 2-39.)
- (6) Voices like on the radio. (1/20/92) (Stratford Dep. I at 96; Ex. 2-99.)
- (7) Synthesizer music. (3/16/92) (Stratford Dep. I at 97; Ex. 2-100.)
- (8) Pops, clicks and snaps but no voices. (4/27/92) (Ex. 2-138.^(u))
- (9) Angelic voices, singing. (8/3/92) (Ex. 2-39.)
- (10) Voices like a "pentecostal speaking in tongue," along with music. (8/31/92) (Ex. 2-141.)
- (11) Ongoing "radio hallucinations." (9/28/92) (Ex. 2-141.)
- (12) Cartoon sounds, pops, clicks, snaps, artillery, music, and some human voices. (12/7/92) (Ex. 2-143.)
- (13) "[A] guy in my mind who talks to me." (9/21/93) (Ex. 2-148.)
- (14) A ringing telephone. (10/18/93) (Ex. 2-149.)

b. Visually, claimant has reported seeing:

- 1) "Two abortions, fetuses, bone, skulls, pelvises." (Stratford Dep. I at 70.)
- (2) Blotches of grey and sparkling visual flashes of two months duration. (4/10/91) (Stratford Dep. I at 89; Ex. 2-94.)
- (3) Occasional visual disturbances which were undefined. (8/3/92) (Ex. 2 at 106.)
- (4) Molecules strung together and cells. (8/29/94) (Ex. 2-128.)

c. On October 25, 1989, he reported to Dr. Baxter that his hallucinations included hearing "daily sorts of conversations," a variety of types of music, and phones. (Baxter Dep. at 20-21.) He also described seeing flashing lights. (*Id.* at 21.)

d. In his interview by Dr. Rogers, claimant reported the following hallucinations:

- 1) Walls, ceilings, and chairs moving in wave-like fashion. (Tr. at 670.)
- (2) Harsh synthesizer music. (*Id.*)
- (3) His postal mail "breathing." (*Id.* at 671.)

(4) Plants (ferns) moving in rhythmical fashion, sometimes moving to the song of "Sheba." (*Id.*)

(5) Cartoons, including "on one occasion Daffy Duck and Yosemite Sam." (*Id.*)

(6) Ideas planted in his head from outside. (*Id.* at 672-73.)

(7) A "waxy flexibility" which is characteristic of catatonia. (*Id.* at 673.)

26. Over the six year period since the incident, claimant has also reported depression, loss of interest in life, suicidal thoughts, anger, increased sleep, loss of energy, loss of a desire to work, inability to concentrate, apathy, aversion to human contact, a lack of joy, and an inability to maintain his physical exercise program. (Ex. 2-81 to 2-154; Stratford Dep. I, and Stratford trial testimony.)

27. Following the incident, except for the approximately eight weeks off in October and November 1989, claimant continued working for another two years. Then, on March 18, 1991, he had an encounter with Biggins over his performance. According to claimant's written description of the event, Biggins called him to his office at 7:17 a.m. to ask claimant why he had missed four ventilator checks the previous week and also to ask why he had worked two and a half hours overtime that week. (Ex. 14-151 to 14-159.) During the encounter claimant became angry. He described his reaction as follows:

[S]omething inside of me finally snapped. What then gushed forth at that moment was a number of vituperations and scatological appellations referring to the person of Michael Biggins. Concurrently there was an overwhelming anger which came over me and which now frightens me to think about. Suddenly some force grabbed me by the back of the neck inflicting great pain. I began to hear a high-pitched sound similar to the noise a table saw blade makes when it is cutting through a piece of high density wood such as oak or hickory. I heard this sound directly behind me rapidly coming closer to the back of my head. The closer the noise approached to me the greater the pain became in my neck until it felt as though the blade was cutting into the back of my head. At the same time I began to see flashes of light at the periphery of my vision in both eyes. As my anger was still accelerating [sic] I began to hear other sounds about the room like I was in a factory or a wood-shop with all the machines running. There were high-pitched whining sounds and low frequency grinding noises. They seemed to be all around me. At this point I began to feel light-headed and dizzy. Suddenly Biggins suggested that we should end this discussion to which I immediately agreed. . . .

(Ex. 14-157 to 14-158.) According to claimant's written report and his diary, at 9:23 a.m. he spoke to Dr. Stratford and told him of the events of the morning. (Exs. 14-158 and 17-263.) In response, Dr. Stratford prescribed six weeks off work. (*Id.*)

28. Important to later findings regarding malingering, the claimant's written report of the incident is over eight pages long, detailed to the point of noting the exact minute of each event, highly coherent and organized, and articulate. (Ex. 14-151 to 14-159.)

29. Claimant never thereafter returned to work and claims that he is permanently totally disabled from doing so on account of mental illness.

30. Eye witness evidence concerning claimant's behavior before and after the needle stick was conflicting:

a. Ron Simpson, who has known claimant since 1986, testified that before the needle stick claimant had been extremely active in school and socially active. (Tr. at 720.) After the needle stick he said that claimant was going through a grieving process; claimant told Simpson that he was not doing well. (Tr. at 723.) When he visited claimant's house six months prior to trial, Simpson noted that claimant's housekeeping had significantly deteriorated, as had his dress. (Tr. at 727-29.) Cross-examination, however, established that Simpson had his own set of problems which could affect his view of the matter. He had been terminated by Community for drug use. (Tr. at 733.) He worked with claimant for nine or ten months in 1986 and 1987. He had only seen claimant intermittently since he left Community in July 1987. (Tr. at 727-29, 736.) While he also attended the University of Montana, he did not take any classes with claimant. (Tr. at 726.) Some of what he related concerning claimant's decline in school and mental state was based on what claimant told him. (Tr. at 718-34.)

b. Bill Triggs has known claimant since 1980 and worked at Community as a building engineer. (Tr. at 738.) From 1989 to 1991 claimant and Triggs were working on developing and selling three inventions -- "a plywood/sheetrock carrier," a "fly-fisherman's friend" and a retractable needle. (Tr. at 740-41.) Triggs testified that in the nine months following the needle stick claimant lost interest in "most of the stuff we was [sic] doing." (Tr. at 744.) Counsel for claimant then walked Triggs through and had him confirm a written statement prepared by claimant in 1992 which reflected Triggs' observations about claimant. (Ex. 2-175.) Triggs confirmed the representations made in the statement that following the needle stick, claimant's hair began falling out and turning gray, and that claimant withdrew, slept a lot, and stopped lifting weights. (Tr. at 746-49.) Triggs had difficulty with dates and clearly considered claimant a friend and business partner. His testimony concerning claimant's loss of interest in the various inventions was inconsistent with other evidence indicating substantial efforts by claimant after the needle stick to promote the inventions and a magnetic medical card. (See Claimant's Diary, Ex. 2.)

c. Katherine Spealman knew claimant between 1984 and 1991. (Tr. at 757-58.) She met him while working for Community. In 1987 she suffered a work-related injury, resulting in a claim. (Tr. at 757, 769.) She quit working for Community in 1988. (Tr. at 757.)

According to Spealman, she became friends with claimant and socialized with him after work. (Tr. at 758-59.) At one point she indicated she dated him for a short while. (Tr. at 767.) She characterized him as an energetic, hard-driving individual prior to the needle stick, and as keeping himself in good physical condition. (Tr. at 759, 761.) After the needle stick she said that he became depressed, quit taking care of himself, was angry, and slept a lot. (Tr. at 760-61, 763.) She stopped seeing him in 1991. In 1992 claimant contacted her to ask her about what she had noticed about him since the needle stick, telling her "he wanted to have it documented in case -- he knew at that point that he was going to try to see if he could get the company that had given the defective needle." (Tr. at 761-62.) Spealman also said that claimant was "devastated" and depressed by a divorce that occurred prior to the needle stick. (Tr. at 768.)

d. Meridee Lieberg is a registered nurse who has worked for Community for 9 years. (Tr. at 439.) She worked the same shift as claimant and her shift coincided with claimant's shift on the average of two nights a week. (Tr. at 440.) On those nights they often saw each other and worked together. (*Id.*)

Lieberg characterized claimant as "a real different kind of person, kind of unusual, very intelligent. Used the big words to try and impress people." (*Id.*) She also characterized his attitude as "negative" and then elaborated, "Kind of a fatalistic negative attitude." (*Id.* at 441.)

In 1992 claimant provided Dr. Stratford with a typewritten summary of what he claimed Lieberg had said regarding changes he had experienced after the needle stick. The statement is found at Ex. 2-177, and reads as follows:

1. I noticed Michael demonstrating increased forgetfulness. We had to call and remind him to do things.
2. There was a mood change (depression). He acted as though something was bothering him all the time - preoccupation.

Lieberg did not prepare and was not provided with a copy of the statement and did not agree with it. (Tr. at 447-48.) At trial she testified that she did not observe any change in claimant's personality following the needle stick. (Tr. at 445-48.) She further testified that claimant asked her if he was forgetful and that she had replied in the affirmative because he was forgetful both before and after the incident. (Tr. at 446.)

31. Kaylin Ward is a respiratory therapist who has worked for Community since 1988. (Tr. at 451.) She first met claimant in 1987 when she was in training and did her clinical training under claimant's supervision. (*Id.* at 451-52.) She characterized him as "detached" prior to the needle stick. (*Id.* at 459.) She observed that both before and after the needle stick he did not socialize during work and often read books even during staff meetings. (*Id.*) She did not notice a change in his behavior or appearance following the incident. (*Id.* at 456-57.)

32. Gail Hay is another respiratory therapist. (*Id.* at 462.) She has worked at Community since 1976 and worked with claimant from 1979 to 1991. (*Id.* at 463.) When asked to describe claimant's outlook on life prior to the incident, she said:

He didn't really like the social political structure. We kind of called him the doomsday prophet. He was a little bit cynical.

(*Id.* at 464.) She did not observe a change in his personality after the incident (*Id.* at 469), although she indicated that beginning prior to the incident claimant did become more agitated about his job due to additional requirements made by the hospital on its respiratory therapy staff. (*Id.* at 472 and see *Id.* at 454.)

33. Sally Gauer worked in Community Hospital's respiratory therapy department from 1980 to 1992. (Gauer Dep. at 4-5.) She was on the shift following claimants' shift but talked to claimant at each shift change. (*Id.* at 6.) Their discussion at shift change averaged 30 minutes. (*Id.*) Gauer characterized claimant as "introverted" to the extent that in the 12 years she knew him, she "hardly knew him." (*Id.* at 7.) She described him as lazy and confirmed the "doomsday" description provided by Hay. (*Id.*) She did not observe any personality change following the incident. (*Id.* at 9.)

34. In Dr. Stratford's opinion the claimant suffers from "schizoaffective disorder" or "schizoaffective schizophrenia." (Tr. at 325, 404, 427.) He described the disorder as one where the individual has "mixed symptoms of both schizophrenia and mood disorder."⁽²⁾ (*Id.* at 325.) Despite vigorous cross-examination at trial, Dr. Stratford adhered to his opinion and gave the further opinion that claimant is not malingering mental illness. (*Id.* at 303, 345, 406.)

35. In Dr. Stratford's opinion, claimant's mental illness was precipitated by the needle stick incident and is totally disabling. (Tr. at 338-89, 405.)

36. Dr. Walters, who examined claimant in the summer of 1992, "did not see a real clear path to a clinically certain diagnosis." In his report to Dr. Stratford, he said:

This case presents an unusually complex and difficult diagnostic picture. Based on all available data, the diagnostic impression that best fits all of the data appears to be schizoaffective disorder (295.70). However, I also believe that a diagnosis of

Psychotic Disorder NOS [not otherwise specified] (Atypical Psychosis) would be a reasonable alternative.

(Ex. 2-63.) He had no opinion concerning claimant's condition at the time of trial and conceded that claimant could be malingering.

Malingering -- Expert Evidence

37. Dr. Stratford defined malingering as the "conscious fabrication of symptoms . . . [for] secondary gain." (Tr. at 401.) Dr. Rogers defined "malingering" as "the deliberate fabrication or gross exaggeration of psychological or physical symptoms towards an external goal," including a financial gain. (Tr. at 669.) "Feigning" is "the voluntary fabrication or exaggeration of psychological or physical symptoms." (*Id.*) Those definitions are consistent with the definition set for in the Diagnostic and Statistical Manual of Mental Disorders, (4th ed. 1994) ("DSM-IV"), which describes the "essential feature of malingering" as the "intentional production of false or grossly exaggerated physical or psychological symptoms, motivated by external incentives such as avoiding military duty, avoiding work, obtaining financial compensation, evading criminal prosecution, or obtaining drugs." (*Id.* at 683.)

38. Dr. Stratford administered a number of tests on claimant.

- a. He administered a Minnesota Multiphasic Personality Inventory (MMPI) on October 3, 1989. (Ex. 3.)
- b. He administered a MMPI-2, which is an updated version of the MMPI, on May 20, 1992. (Ex. 3-61.)
- c. On November 16, 1990, he administered a Millon Clinical Multiaxial Inventory (MCMI). (Ex. 3-30 to 3-32.)
- d. On October 5, 1994, he administered a Structured Interview of Reported Symptoms (SIRS).

39. Dr. Rogers administered a Portland Digit Recognition Test and a Personality Assessment Inventory (PAI). (Tr. at 682.)

40. Both the MMPI and the MMPI-2 contain an "F scale," which is a score based on a series of questions which may be indicative of exaggeration or falsification of test answers. (Stratford Dep. I at 41.) Exaggeration may indicate malingering. (Tr. at 241, 530.)

41. The F scales on both MMPIs were significantly elevated. Dr. Stratford agreed that the MMPIs showed symptom exaggeration in a "fake, bad" direction, and that the clinical scales for both tests were therefore invalid. (Stratford Dep. I at 40, 47; Tr. at 179-184, 225.) He characterized the F scale for claimant's MMPI-2 as "off the charts." (*Id.* at 182.)

42. Dr. Stratford testified that there are a number of possibilities, other than malingering, for the elevated F scale scores. He said that an elevated score may also "reflect a lack of an 8th grade reading ability.... [a] cry for help..., confusion, and psychosis to an extent...." (*Id.* at 343.) Dr. Walters also acknowledged that the scores were extremely elevated. He identified the following possible explanations for the elevation:

Well, that kind of an extremely elevated F scale may occur because the subject who was taking it has reading problems, is confused about the purpose of the test. You may get that kind of an elevation because the individual is extremely severely disturbed as in floridly psychotic. It can occur because an individual is just very careless through part or all of the MMPI. It can occur because the individual is exaggerating, is endorsing a great many items indicative of pathology and the extreme of that exaggeration is you may get that kind of a profile because of malingering.

(*Id.* at 801-02.)

43. Dr. Rogers also reviewed the claimant's MMPI and MMPI-2 results. He noted that on the 1989 MMPI, claimant's F scale score was as high or higher than "the cutting score for malingering" in 18 of the "18 studies which have been done using the MMPI in terms of feigning." (*Id.* at 688.)

44. In assessing possible explanations for claimant's high F scale score, Dr. Rogers ruled out any reading problem. (*Tr.* at 688.) He also ruled out confusion or carelessness, pointing out that the MMPI contained two scales -- the retest index and a carelessness scale -- to determine if the individual is responding systematically or consistently in his or her answers. (*Id.* at 689.) The retest index scale consists of 16 pairs of questions which are identical but spread out in the test. (*Id.*) The carelessness scale consists of 12 pairs of items which are opposite in content. (*Id.*) Claimant's scores on these scales indicated that he answered consistently. (*Id.* at 689-90.)

45. Dr. Rogers also was not impressed by the possibility that claimant's elevated F scale score might be due to psychopathology. He noted that of the 18 F scale studies, "11 of them addressed psychiatric populations, . . . his scores again meet or exceed the cutting score for each of those 11 studies." (*Id.* at 690.) He concluded that among the explanations for the elevated scores, "malingering is a high probability in this case." (*Id.* at 691.) He then amended his answer to state that it is a "**very** high probability." (*Id.*; emphasis added.)

46. Dr. Rogers also evaluated other MMPI scales indicative of feigning.

a. One of those measures is the F minus K scale. Claimant's raw score was 27, which exceeds the highest cutting score in every one of the 27 studies done to determine feigning based on that scale. (*Id.* at 691.) The highest cutting score in any of the studies was 24.

b. Another scale is the Ds or Dissimulation scale, which "is a little more sophisticated than the other measures in that it looks at stereotypes of what mental illness is like and what normal folks are like." (*Id.* at 692.) Dr. Rogers pointed out that this particular scale is uniquely suited to evaluating individuals with mental health backgrounds:

Indeed this [the scale] actually works with people in mental health backgrounds. Tends to be a helpful tool in discriminating from people who are feigning to people who are not.

(*Id.*) Noting that the higher the score, the more likely the individual is feigning, Dr. Rogers testified that the highest cutting score for determining feigning from this scale is 35; claimant scored 51. (*Id.* at 692-93.)

c. Similarly, claimant's score on the "obvious versus subtle scale", another scale indicative of feigning, was 40 points higher than a cutting score widely used in evaluating that scale. (*Id.* at 693.)

47. Dr. Rogers reviewed claimant's MMPI-2 results. The MMPI-2 was developed in 1989 and designed to replace the MMPI. It eliminated some objectional items, modified others, and renormed the scales. (*Id.* at 693-94.) As with claimant's original MMPI, the results on the F, F minus K and obvious versus subtle scales were elevated and above cutting scores for feigning. (*Id.* at 694.)

48. The MMPI-2 also contains an additional scale which may indicate feigning. That scale is the "Lachar-Wrobel" scale. Dr. Rogers described the usage of the scale as follows:

The Lachar-Wrobel is looking at what are called critical items. Critical items are those which psychologists and other mental health professional should pay immediate attention to because of the sense of urgency about them.

....

The studies have established that psychiatric patients certainly endorse some of these but when they are endorsed to an extreme degree, then in fact it is clear evidence that this person is fabricating symptoms.

(*Id.* at 695.) The highest cutting score established through research is 67; claimant's score was 75.

49. Claimant told Dr. Stratford that he had answered MMPI questions "randomly." (*Id.* at 279-80.)

50. Dr. Faust testified persuasively that claimant's MMPI F scale scores were not the result of random answers. (*Id.* at 533-44.) Indeed, the possibility of random answers is remote. (*Id.*)

51. Moreover, in his deposition the claimant testified that he answered all MMPI questions truthfully. (Blythe Dep. I at 62.) This answer is important not only in the context of the MMPI but also in determining claimant's honesty and credibility. His deposition answer contrasts to what he told Dr. Stratford. (See Finding 43.) His statements are further evidence of the conclusion, reached in later findings, that the claimant is not credible or truthful.

52. While the MCMI is not as good an indicator of malingering as the MMPI (Tr. at 518-19), claimant's responses to that test were similarly exaggerated (*id.*; Stratford Dep. 1 at 39-40).

53. Dr. Stratford agreed that claimant was "lying through his teeth" in his responses to the SIRS test administered on October 5, 1994. (Stratford Dep. I at 37.) However, he questioned its validity when applied to psychiatric patients.

54. Dr. Rogers was the primary author of the SIRS, which is a structured interview administered "to assess malingering and other response styles." (Tr. at 697.) In developing the test, Rogers established specific rules to minimize the likelihood that a genuinely mentally ill patient will be misclassified as a malingerer. (*Id.*) The test has been validated on groups of mentally ill patients, including psychotic patients. (*Id.* at 698.) Dr. Rogers described the items which are included in the test as follows:

Yes. Since all malingerers don't present in the same way, it's important to develop different strategies or different scales as a way of detecting who it is that might be feigning and who might not be feigning.

The RS stands for rare symptoms. Rare symptoms, by definition, are symptoms which infrequently occur among psychiatric populations but do certainly occur. With all of these scales it's not whether the person has any one or several, but it's the pattern in its number of items which in fact works.

So for rare symptoms, we know what are the likely number of rare symptoms that psychiatric patients would have and we know what far exceeds that and what's likely that malingerers or simulators will have.

Symptom combination refers to there are many symptoms which are common among psychiatric populations, such as weight loss or weight gain, and the relationship of pairs of symptoms which commonly occur but really occur together. Again, there may be several of these that occur in a particular patient. We're looking at the proportion of symptoms that are likely to occur.

IA stands for improbable or absurd symptoms. These are symptoms which have a preposterous or ridiculous quality to them. This scale tends to not work with some folks who are malingering who are more sophisticated because of the preposterous nature. When it does work, of course, it provides you with quite convincing evidence.

The fourth scale is BL, or blatant symptoms. These are symptoms which are, by their nature, symptoms about suicide, symptoms which one would view as being very critical or very central symptoms.

Subtle symptoms are referred to as symptoms which are more-would be more characterized as psychological problems but not nearly as severe or blatant as a blatant symptom.

Selectivity. Some individuals who malingering just are indiscriminate in their endorsement of symptoms. What selectivity does is it looks at is [sic] the person being just indiscriminate. Are they endorsing just a huge range of different kinds of psychological problems.

Severity refers to the number of symptoms that the person sees at [sic] an extreme or unbearable standard. Many psychiatric patients experience a cluster of symptoms being severe, extreme or unbearable but they don't experience a whole range of symptoms as being severe and unbearable.

RO refers to reported versus observed. Here we're looking at issues in terms of how the person presents themselves in terms of their -- oftentimes in terms of their speech pattern or the nonverbal behavior in the relationship of how they present themselves on this, to what is observed by the clinician.

(*Id.* at 698-701.) Malingering is probable if "any score is in the definite range or three or more scores [are] in the probable range." (*Id.* at 701, 703.) Claimant scored in the probable range on five scales. The cutoff score for the test is 76. After rescoring the test and giving the claimant the benefit of the doubt on certain questions, claimant's score was 100, reflecting a high probability of malingering. (*Id.* at 705-06.)

55. Among the tests administered by Dr. Rogers was the Personality Assessment Inventory (PIA). Like the MMPI, it has numerous scales, including validity scales used to determine whether "an individual is responding in a forthright fashion or whether, perhaps, they are feigning either good or bad." (*Id.* at 675-76.) One of the validity scales is the Negative Impression Scale (NIM). In terms of percentiles, scores above the 70th percentile indicate feigning. (*Id.* at 676-77.) Claimant's score was above the 99th percentile. (*Id.* At 677.) When the scale is normalized just for psychiatric patients, claimant's NIM score was still above the 99th percentile, meaning that more than 99 of every 100 psychiatric patients taking the test scored lower on the scale than did claimant. (*Id.* at 677-78.) Dr. Rogers testified that claimant's responses on the test were deliberate, not random.

His responses on this profile, within terms of this test, that he was responding in a consistent fashion, was not endorsing terms which would be atypical but unrelated to psychopathology **but was selectively endorsing items that were infrequent and related to possible psychopathology.**

(*Id.* at 679, emphasis added.)

56. Claimant's raw score on the NIM scale was 17. (Ex. 21-69; Tr. at 681.) Dr. Rogers, who is in the process of doing research on the use of the PAI to specifically detect individuals feigning schizophrenia, depression and generalized anxiety, testified that claimant's score was higher than 93.3 percent of schizophrenic patients taking the test and higher than 98.5 percent of the depressed patients taking the test. (Tr. at 680.) Dr. Rogers testified that, "it's a very small probability that genuine patients would score at 17 or above." Thus, there is a "high probability that his [claimant's] NIM score is based on malingering." (*Id.* at 680.)

57. Dr. Rogers also administered a Portland Digit Recognition Test. (*Id.* at 682.) The test is used to detect individuals who are feigning cognitive problems, particularly problems with concentration or short-term memory. (*Id.*) The test was administered to claimant because he complained of "severe problems with concentration and short-term memory." (*Id.*) The test was administered to and normalized for various criterion groups, including groups of individuals with moderate and severe brain damage. (*Id.* at 683-84.) The lowest score for any of the criterion groups was 39; claimant scored 27. (*Id.*) To a 90 percent probability, an individual answering randomly, i.e., by chance, would score between 30 and 42 on the test. Claimant's score of 27 fell in the 97th percentile, meaning that "97 percent of the time this is unlikely to have occurred by chance and only to have occurred if the individual is feigning." (*Id.* at 684.) Dr. Rogers testified that "*[t]he only logical way that a person could score below chance is if they recognized the correct answer and chose to answer incorrectly.*" (*Id.* at 685, emphasis added.)

58. On July 13 and August 5, 1992, Dr. Walters examined claimant at Dr. Stratford's request. Dr. Stratford asked Dr. Walters whether claimant "was a bullshitter or was he crazy." (*Id.* at 183.) Dr. Walter's notes recorded the conversation as "B.S. or crazy." (*Id.* at 814.)

59. Dr. Walter testified that the DSM-IV lists four criteria, any combination of which, require consideration of malingering as a diagnosis. (*Id.* at 807-09.) Those criteria are:

1. Medicolegal context of presentation (e.g., the person is referred by an attorney to the clinician for examination)
2. Marked discrepancy between the person's claimed stress or disability and the objective findings
3. Lack of cooperation during the diagnostic evaluation and in complying with the prescribed treatment regimen
4. The presence of Antisocial Personality Disorder

(American Psychiatric Association, Diagnostic and Statistical Manual of Mental Disorders 683 (4th ed.)

According to Dr. Walters two, and possibly three, of the criteria are present in this case. (Tr. at 830-36.) Dr. Walters conceded that malingering is a definite possibility in this case.

60. Both Drs. Walters and Stratford testified that claimant can be exaggerating and falsely reporting symptoms and still be psychotic. (*Id.* at 225, 360, 837.) I have carefully considered and weighed this possibility in reaching my decision in this case.

61. Dr. Stratford testified that some of claimant's symptoms are atypical. Drs. Rogers and Faust agreed and added to Dr. Stratford's list of atypical symptoms. The atypical symptoms are set forth below:

a. The typical age of onset of psychosis⁽³⁾ in males is 18 to 25. (Stratford Dep. 1 at 22.) Claimant was 41 at the date of the onset of his alleged psychosis.

b. Persons suffering from psychosis triggered by trauma typically recover quickly, often in less than a month. (*Id.* at 25.)

c. Only 25% of schizophrenics with auditory hallucinations also have visual hallucinations. (Tr. at 434-35.) Dr. Stratford at one point characterized claimant's visual hallucinations as "remarkably bizarre." (Stratford Dep. I at 70; Ex. 2-84 to 2-85.)

d. When interviewed by Dr. Rogers, claimant reported extremely unusual visual hallucinations that he had not previously reported. Dr. Rogers described the hallucinations as follows:

Q: Now, backing up to what occurred during the interview which was indicative of malingering, could you answer that, please?

A: Yes, I can. He reported some extremely unusual visual hallucinations that had not been reported by anyone, any of the other clinicians who had seen him. Some examples of that were they described in the room, and this actually happened, according to him, the first time when he was waiting for Dr. Stratford, for an appointment with Dr. Stratford, that the walls in the room began to move kind of like waves down the walls. All four walls were moving in terms of these wave-like actions. The ceiling was moving, the chairs were moving. In fact, mentioned that all things were moving but mentioned those in particular.

There was some harsh type synthesizer music that he heard at this particular time. This went on for a period, according to him, of approximately 20 minutes right up to the time that Dr. Stratford came to see him for his appointment. He described this happening, similar experiences to this happening on other occasions over the last several years.

In addition to that, he also described some other very bizarre visual and visual/auditory hallucinatory experiences. One such experience was the fact that his mail, his postal mail appeared to be breathing in terms of having a kind of rising and falling action in a rhythmical way. He described that, and this he described happening, all these experiences, during a completely wakeful state, not with the television on or any other kinds of phenomenon where in fact it's the plants, and he mentioned specifically his ferns, moved and were moving in a rhythmical fashion. He describes them as leaves, perhaps fronds moving up and down. Described this as sometimes moving to the song of "Sheba."

In addition to that, he described and again in a wakeful state without the television on, episodes of cartoons which he experienced as occurring directly in front of him, and these experiences included on one occasion Daffy Duck and Yosemite Sam. On other occasions included other cartoon characters. These are extremely atypical and not what one would find in terms of genuine disorders.

Q: Have you conducted any research regarding hallucinations?

A: Yes, I have.

Q: Are these reported hallucinations highly atypical?

A: They are highly atypical and certainly in terms of their presentation.

(Tr. at 669-72.)

e. Dr. Rogers went on to describe other symptoms reported by claimant as "very rare:"

By rare symptoms, I mean symptoms which are possible but the likelihood of several of these things occurring is extremely small.

Examples of rare symptoms would be neologisms, which, as you know in terms of his testimony in court, he understood and easily recognized when I asked him about his, that I was asking about neologisms. Described in fact that he had had several of these during the last year, although was -- had difficulty recalling what they might be.

He also described having thought insertion. Thought insertion was where a person believes that ideas are being directly implanted into their head. So this is different from an auditory hallucination where the person experiences it coming from the outside. This is where the thought is being directly implanted into the person's head.

He experienced these on a number of occasions from both, he believed, like the source being both God and demons in terms of that.

He also described a symptom which is sometimes referred to as waxy flexibility or as catalepsy, I apologize for the technical words. It is a symptom of catatonia. It is a symptom in terms of problems of mobility, in terms of assuming odd postures for periods of time. When I began asking a bit about this, he recognized it clearly as a symptom of catatonia and said, yes, I have that.

Id. at 672-73.)

f. Dr. Faust, noting the unusually large number of different types of hallucinations, characterized the variety of symptoms as "quite unusual." (*Id.* at 510-11.)

Secondary Gain And Claimant's Credibility

62. Claimant was clearly angry over being stuck by an AIDS contaminated needle and believed that the arterial blood gas kit, of which the needle was a part, was defective. He also believed that Community was negligent in allowing its continued use.

63. Immediately following the needle stick incident, claimant began recording information concerning the allegedly defective blood gas kit, Community Medical Center's continued use of the kit, and his own mental state. (Ex. 17.) The entries began within two days after the incident (*id.* at 15) and were made in the diary he kept (Tr. at 60).

64. Commencing on February 1, 1989, claimant began noting sleeplessness, panic and anxiety attacks, depression and ultimately, hallucinations. On February 1st, he recorded "sleep disturbances." (Ex. 17-15.) On February 7, 1989, he recorded a panic attack. (*Id.* at 17.) He thereafter continued to periodically make entries concerning panic, anxiety, anger, manic attacks and depression, or generally his "psychological state." His entries over the next few months were made on February 23, 1989 (*id.* at 22); March 9, 1989; March 9, 1989 (*id.* at 29); April 4, 1989 (*id.* at 33); June 10, 1989 (*id.* at 52); August 1, 1989 (*id.* at 67); August 3, 1989 (*id.* at 68); September 15, 1989 (*id.* at 81); September 20, 1989 (*id.* at 82). He further recorded conversations in which he told others of his panic attacks or depression. (*Id.* at 19, 26, 75, 83, 85.) On August 29, 1989, he made the following entry:

*Ex: of Depression -- told Linda Bloxum [at approximately] 2330 that I was probably ready to die now because i have had such a rich life both experientially & educationally -- she appeared somewhat shocked & made an excuse to leave the depart. [within approximately] 10-15 seconds [after] i made that statement.

(*Id.* at 75.) He also recorded a conversation with another individual wherein she related her depression due to her father's death and being stuck with an AIDS contaminated needle. (*Id.* at 55.)

65. Claimant recorded observations concerning the continued availability and use of the allegedly defective blood gas kits, going so far as to have others make observations for him

and to take photographs. On February 28, 1989, he recorded a conversation with Linda Smith, whose job at Community included quality assurance, concerning "defective ABG [arterial blood gas] kits." According to his note, he was assured the kits had been removed from use. (*Id.* at 23.) But in a note the next day, March 1, 1989, he recorded that he had discovered a kit in a drawer in the PFT lab. (*Id.*) On March 2nd he recorded that the kit was still in the drawer. (*Id.* at 24.) On March 29th he recorded, "Ron: Pictures of syringe (defective)(rescheduled)." (*Id.* at 31.) A note on May 13, 1989 reflects that he actually "[t]ook pictures of defective Radiometer ABG kit still in drawer in PFT lab." (*Id.* at 44.) On May 28, 1989, he recorded that Sue Buchholtz had observed a defective kit in the PFT lab drawer at 2:05 a.m. (*Id.* at 48.) On May 29, and June 6, 7, and 24, 1989, he recorded different people had observed the ABG kit in the PFT lab. (*Id.* at 49, 51, 56.) On July 8, 1989, he took more pictures of the ABG kit and reported that it had been "transferred from site of old PFT lab in basement to new location also in basement of MCMC still available for use." (*Id.* at 60.)

66. Shortly after the needle incident, claimant also began compiling articles concerning AIDS and later on employed a researcher to obtain abstracts of articles concerning schizophrenia. (*Id.* at 89-90, 102.) At the time of hearing he had compiled a stack of materials 10 to 12 inches high. (Tr. at 90.)

67. At trial claimant admitted that he intended "from the very beginning" to sue Radiometer, the manufacturer of the blood gas kit. (*Id.* at 774.) He elaborated:

It took several days, several weeks, perhaps, but I came to the realization very quickly that they had violated the law and I fully intended to sue them for that and out of that anger, which was basically rage at that time, arose the other facts that then came into the case.

(*Id.* at 775.)

68. On March 12, 1989, just a month and a half after the incident, the claimant made an entry which reads in relevant part, "Talked c [with] Dr. Bob [Ammons] this evening about **triggering event -- he verified what I said.**" (Ex. 17-26, emphasis added.) According to claimant, Dr. Ammons is a psychologist who teaches at the University of Montana. (Tr. At 395.)

69. On March 23, 1989, less than two months after the incident, claimant referred in his diary to Jerry Spence and Melvin Belli, two well known tort lawyers. (Tr. at 173.) At trial, claimant explained that he wrote their names in his diary because he was considering consulting with them concerning business matters pertaining to the marketing of a plywood/sheetrock carrier a friend had invented. (*Id.* at 173, 780-81.) However, in further notes he made on the same page as his reference to Spence and Belli, claimant wrote "law suit." (Ex. 17-30.) I find his explanation regarding his reference to Spence and Belli at best

implausible and, more likely than not, a deliberate falsification to conceal the fact that he recorded their names as potential lawyers who might represent him in lawsuits arising out of the needle stick incident.

70. Within a week of the note concerning Spence and Belli, claimant made an entry concerning the rescheduling of photos of the defective syringes. (*Id.* at 31.)

71. On April 21, 1989, his diary reflects an interesting discussion with Biggins concerning lawsuits. (*Id.* at 38.) According to claimant's note, Biggins told him that his (claimant's) filing of an incident report and his having tested HIV negative on the first test would work in his favor in any lawsuit. Claimant then went on to say, "Lawsuits are currently serving as precedent [sic] setting in terms of the formulation of law in this area." (*Id.*)

72. Dr. Stratford testified that when he initially saw claimant he was impressed by the fact that claimant seemed uninterested in a lawsuit (Tr. at 175-76, 186-87, 190); he felt it took claimant a "considerable amount of time . . . to become preoccupied with legal aspects of the case." (*Id.* at 176). Dr. Stratford commented that it was only after claimant became obsessed with litigation that he began exaggerating. (Stratford Dep. I at 57-59; Tr. at 176-77). Referring to his initial contact with claimant in October 1989, Dr. Stratford said, "There were no legal issues at that point" and that "in the beginning, he was a sick guy; before the litigation, before those issues occurred." (Stratford Dep. I at 57, 59.)

73. When confronted with notes taken by claimant on October 3, 1989 (the day after Dr. Stratford examined claimant and found him to be "floridly nuts"). Dr. Stratford conceded that the notes showed that claimant was in fact already interested in a lawsuit. (Tr. at 190-98.)

74. The October 3, 1989 notes are from a lecture on AIDS which claimant attended. The notes contain personal comments by claimant. Among his comments was, "This exposure was the crowning blow re: the destruction of my ego -- related to lifelong examples of rejection." (Ex. 16-15.) He specifically mentioned a lawsuit in a personal context:

** Social Rejection is a big aspect of lawsuit -- should be lge [large] settlement.

Lage [large] Corps [corporations] should have to pay top \$ settlements just for this factor alone.

My particular case an important social isolation factor.

(*Id.* at 16.)

75. In notes taken October 10, 1989, claimant entered the following in the margin: "Legal Aspects: What Community Hospital might try to use against me." (*Id.* at 18.) On the next page of his notes, claimant refers to "Workman's Comp.", adding, "Long Term and short

term disability but certain very specific parameters, **i.e. clinical diagnoses.**" (*Id.* at 9; emphasis added.)

76. Notes taken on November 7, 1989, further reflect claimant's preoccupation with launching a lawsuit.

a. In the margin of the second page of his notes, he wrote, "My lawsuit?" (*Id.* at 27.)

b. On the next page he made notes about Miss Wyoming being "awarded \$27 million even though her name was not specifically mentioned in an article in Penthouse or Playboy." (*Id.* at 28.) He went on to record, "She claimed that by deduction readers could figure out who she was. This was considered to be defamation of character." Then, in the margin next to these notes, he recorded, "**Could i use this in my lawsuit?**" (*Id.* at 28, emphasis added.)

c. Below the notes on Miss Wyoming, he made a list of personal consequences of the needle stick incident, as follows:

1. Must get blood tests for the rest of my life.
2. My psychiatric records are potentially dangerous to my professional & future professional aspirations if they should become public knowledge.
3. Side effects of the meds that i am [on] are potentially dangerous to my health & well being.
4. If i should come down [with] AIDS who is going to pay the medical bills.

(*Id.*) Then, in the margin next to this list, he wrote, "**[W]ork on these ideas for the lawsuit.**" (*Id.*, emphasis added.)

d. On the next page of the November 7, 1989 notes, claimant queried whether he could use Biggins' appointment book to determine if Community officials had discussed claimant's danger to patients and staff. (*Id.* at 29.) Later on the page he wrote, "**Triggering Incident -- needle stick broke the dam & everything unraveled for me.**" [Emphasis added.]

77. Three years after the incident, on September 14, 1992, claimant reported to Dr. N.L. Hoell, a psychiatrist who at the request of Dr. Stratford examined claimant on two occasions, that "[h]e feels he's been generally treated bad by people throughout his life and is tired of being treated badly, **will reciprocate whenever this happens with legal action when appropriate.**" (Ex. 2-72, emphasis added.) Dr. Hoell further reported:

He feels strongly that there was negligence in terms of having him and other employees at the hospital work with sub-standard equipment. **He seems determined to pursue his legal action all the way.** [Emphasis added.]

(*Id.* at 73.)

78. Meridee Lieberg, a registered nurse at Community, testified that:

[claimant] told me he was going to file a lawsuit against the company that supplied the syringes for the hospital and if I testified in his favor and he won the case, he was going to send me on an expense-paid trip to the Bahamas or the islands.

(Tr. at 447.) Lieberg was a credible witness and I find that the conversation in fact took place.

79. On April 24, 1991, claimant recorded the following in his diary:

"Dr. Stratford calls my attention to the fact that once he tells Travelers I'm psychotic, it's in the grid, **more damages** I should be able to get." [Emphasis added.]

(*Id.* at 164-65; Ex. 17-275.)

80. After considering claimant's own notes and actions during the months following the needle stick, along with the other evidence in this case, including claimant's demeanor and testimony at trial, I find that at the time claimant was examined by Dr. Stratford in October 1989, he was already obsessed with suing Radiometer and Community and was actively plotting his course of action against them. In fact, the claimant decided to pursue legal action immediately after being stuck with the AIDS contaminated needle. The element of secondary gain was, and is, fully present.

Further Facts

81. Claimant's cessation of work occurred shortly after claimant began to more actively seek an attorney to represent him in an action against Radiometer and Community. Claimant testified that he initially consulted with attorneys in Spokane, then with John Whiston, an attorney in Missoula. (Tr. at 776.) He was consulting with Whiston at least as early as January 1990, as Dr. Stratford wrote a letter to Whiston on January 30, 1990. (Ex. 2-185.) Matters apparently then foundered until December 1990 or January 1991, when claimant sought representation from Thomas Frizzel. (Ex. 17-217, 247-50.) Frizzel eventually represented claimant in the litigation against Radiometer, see *Blythe v. Radiometer America, Inc.*, 262 Mont. 464, 866 P.2d 218 (1993), and was the initial counsel in this proceeding. Claimant ultimately launched a lawsuit against Community and the manufacturer of the blood gas kit. (Tr. at 848-49.) His diary for April 24, 1991, a month after his final confrontation with Biggins, reflects an appointment to see Frizzel to "sign papers." (Ex. 17-275.)

82. Prior to the needle stick incident the claimant's job performance was satisfactory, if not excellent. After the incident his performance was criticized on several occasions and he was counseled and reprimanded. (Ex. 14-110, 14-111 and 14-163 to 14-165.) The incidents

might be explained by mental illness but they can also be explained by claimant's growing anger and hostility towards Community and his supervisor, Biggins. The escalation of serious incidents in the late fall of 1990 and winter of 1991 (*id.* at 110-11; 151-59) coincided with claimant's actively seeking an attorney to represent him in the lawsuit against Radiometer and Community. (See Finding 78.) Considering all of the evidence in this case, I am persuaded that claimant's conflicts at Community following the incident were the result of his anger and hostility, not because of mental illness.

83. After claimant's encounter with Biggins in March 1991 and his cessation of work for Community, claimant continued to work at an occasional job for Sunshine Oxygen. On April 5, 1991, after Dr. Stratford had taken him off work, claimant traveled to Butte for a job with Sunshine. (Tr. at 149; Ex. 17-270.) He also continued developmental work on a magnetic medical card and pursued marketing of the three inventions previously mentioned. (Tr. at 150-51, 160-63.) Ultimately, he invested heavily in the proposed ventures, resulting in heavy financial losses. (Stratford Dep. II at 37; Ex. 22.) Claimant declared bankruptcy in 1995. (Ex. 22.)

84. Claimant has made conflicting statements regarding significant facts:

a. In his deposition, claimant testified that he had not had panic attacks prior to the needle stick incident. (Blythe Dep. 1 at 53.) However, he told Dr. Stratford that he had panic attacks during his second marriage. (Tr. at 284-85; Stratford Dep. 1 at 62, 64.)

b. In May of 1992 the claimant answered "false" to the statement "Everything tastes the same." (Tr. at 91.) In August 1992 he endorsed the statement as true. (*Id.*) At trial he said that the statement should be true because in fact everything does taste the same to him because he is a smoker. (*Id.*) Yet, Dr. Stratford testified that if claimant cannot taste then he should not be able to smell either, and that claimant previously told him that he had "many wild sensational smells." (*Id.* at 288-89.)

c. In his deposition the claimant was asked about a history of depression prior to the needle stick incident. He replied that he had been depressed when his second wife left him but that he had "recovered from that pretty well." (Blythe Dep. I at 53.) However, he told Dr. Baxter in the fall of 1989 that "in his words" he had been "profoundly depressed his entire life." (Baxter Dep. at 8.) He similarly told Dr. Stratford that he had been depressed all his life. (Ex. 2-81, 2-88; Stratford Dep. I at 64, 74.) At trial he put yet another slant on the matter, testifying that he had overstated the severity of his depression and that he had learned to avoid depression from his psychology courses:

Q: Now, you told Dr. Sara Baxter when she had an opportunity to see you on approximately October 25, 1989, that you had been profoundly depressed your entire life, correct?

A: Yeah, that was a little overstated at that time. I had been quite depressed most of my life because it was a learned behavior from my father. But when I took psychology courses, I found out that I could unlearn the behavior as well, and so I conquered that problem in my life.

(Tr. at 68.)

d. Claimant testified that he had 50,000 books.

Q: Mr. Blythe, I take it in your 37 years of academia that you have quite a few books?

A: Yeah, about 50,000.

Q: You have about 50,000 books personally?

A: Yes.

(*Id.* at 136.) Claimant was then confronted with the fact that he had listed his books as valued at \$115 in a May 1995 bankruptcy filing. He replied:

I sold those [50,000 books] to George before I went bankrupt. I have documentation for that.

(*Id.* at 137.) George is a former homeless person for whom claimant has provided a home. When counsel pursued the matter and amount of payment from George, claimant said, "[I]t's work exchange. He works." (*Id.* at 138.) In reply to follow-up questions from the Court the claimant then revealed that there is a contract for sale in the sum of \$3,500 which provides that it can be worked off. (*Id.* at 140.) According to claimant, George is working it off. (*Id.*) Also, George is paying \$300 a month rent, which claimant then gives back to him. (*Id.* at 141.) Claimant's contortions go beyond any mere "idiosyncratic manner" of answering questions. His answers and logic smack of manipulation for personal gain. The book deal was a sham that assured claimant that his books were not part of his bankruptcy estate.

e. As previously found, claimant told Dr. Stratford that he had answered MMPI test questions randomly. (Tr. at 279-80; see Finding 46.) At trial claimant denied that he told Dr. Stratford that he answered randomly and said that he had given truthful answers to the questions on the psychological tests administered by Dr. Stratford. (Tr. at 70; Blythe Dep. I at 56.) I find Dr. Stratford the more credible on this point.

Resolution

85. Considering his education, including his course work and degree in psychology, his extensive reading, his intelligence, and his motivation to make Community and the blood gas kit manufacturer pay for what he believed was their negligent and reckless conduct, I find that claimant was capable of fabricating and feigning his symptoms and of modifying his life style and behavior patterns to support such fabrication.

86. Claimant was not a credible witness and has not been truthful.

87. According to Dr. Stratford, keeping a diary such as Blythe's is **not** a typical feature of schizophrenia. "Not traditionally, no. This is something that reflects probably the uniqueness of Mr. Blythe in that he likes to write and likes to order things and order his world like that." (Tr. at 431.) After hearing and weighing all of the testimony in this case, I find that claimant's diary entries were made with a deliberate eye towards litigation.

88. While Dr. Stratford did not believe that the meticulous, organized and coherent notes taken by claimant on October 3, 1989, were inconsistent with what he observed of claimant on October 2 and 3, Dr. Faust disagreed, testifying that the notes were inconsistent with the psychotic state described by Dr. Stratford. (*Id.* at 621.) After examining the notes, observing claimant, and considering the testimony of Drs. Stratford and Faust, I find Dr. Faust's testimony more persuasive. The notes themselves stand in stark contrast to Dr. Stratford's description of claimant on October 2nd as "bizarre, fragmented" and "wild-eyed, floridly nuts." (*Id.* at 328, 189).

89. The timing of the apparent onset of claimant's alleged hallucinations is in itself troublesome.

a. As set out previously, claimant maintained a diary in which he recorded his symptoms. On September 21, 1989, he recorded that he had been to see Dr. Cone, who was treating him for preexisting neck pain, and he told Dr. Cone that he was having depression and "apparent manic episodes"; he did not mention "hallucinations." (Ex. 17-83.) Then, a week later, on September 28, 1989, he made a diary entry indicating that he told Biggins at work, that he was having hallucinations. At the same time he told Biggins that he had an appointment with Dr. Stratford on October 2, 1989, and queried Biggins about the possibility that Dr. Stratford might prescribe a long-term leave of absence. Then, four days later, claimant saw Dr. Stratford, at which time he reported that his auditory hallucinations had begun 30 days after the needle stick. (Ex. 2-81; Stratford Dep. I at 63.) He talked and acted so irrationally that Stratford characterized him as "wild-eyed, floridly nuts, extremely psychotic." (Tr. at 189.)

b. Given the methodical manner in which claimant recorded his psychological symptoms and his conversations about those symptoms, I find it unlikely that he would not have informed Dr. Cone of hallucinations had he been having them. I

further find it unlikely that if he in fact began experiencing hallucinations thirty days after the needle stick incident, he would have failed to contemporaneously record them in his diary.

c. The lack of prior indications of hallucinations, claimant's mention of hallucinations in conjunction with his planned visit to Dr. Stratford, and the sudden, severe irrational state exhibited to Dr. Stratford on October 2nd, along with other evidence of exaggeration and manipulation by claimant, lead me to conclude and find that claimant's behavior and symptoms on October 2nd were planned for their effect and in fact feigned.

90. Dr. Stratford conceded that a skilled clinician, such as himself, can provide "support" for but "not proof" of psychosis. (Stratford Dep. I at 16.) He noted that existing data suggests that clinicians are not particularly good at detecting malingered psychosis (*id.* at 18) and agreed that one should be suspicious of malingering if the test data suggest that possibility (*id.* at 19). Dr. Stratford also acknowledged that Dr. Rogers "is one of the better ones" practicing in the field of psychology in detecting malingerers. (*Id.* at 20.)

91. Dr. Stratford agreed that it is possible that the claimant is in fact malingering (Tr. At 303, 406), although in his opinion he is not.

92. Dr. Stratford agreed that based only on psychological test results he had never seen a stronger objective case for malingering. (Stratford Dep. II at 21-22; Tr. at 193.) He also conceded, as did both Drs. Rogers and Faust, that all of the objective testing showed that claimant "exaggerated, distorted, and over reported all of his symptoms." (Stratford Dep. I at 40, 51.)

93. Dr. Stratford pointed out in his testimony that claimant's exaggeration on psychological tests does not prove that he is not psychotic. (Tr. at 225-26.) The Court agrees with his observation. On the other hand, the test evidence cannot be ignored and is a strong, though not conclusive, indicator of malingering.

94. Claimant's evidence explaining his test scores was unpersuasive.

a. Dr. Stratford and claimant went through some questions from the MMPI-2 F scale. Dr. Stratford concluded that claimant's test answers were the result of his "idiosyncratic way" of analyzing matters. (Tr. at 193.) Dr. Stratford felt that claimant was "just overly-ruminating and over-endorsing some items, based on his understanding of what the question was really asking." (Stratford Dep. I at 36.) He characterized claimant as a "very unusual character" with "nitpicking qualities." (Stratford Dep. II at 19.) At trial he testified that claimant's "style of responding and thinking," which includes "digressive thinking" and seeing the world as "metaphors and abstractions," should be considered. Based on his observations concerning

claimant's character and manner of answering, Dr. Stratford was satisfied with the claimant's answers. (Tr. at 362-63.)

b. According to claimant, he was truthful in his answers to the tests which Dr. Stratford administered. (*Id.* at 70.)

c. At trial claimant was confronted with some of the inconsistencies in his test answers. The following questions and answers are taken from the trial transcript as illustrative of claimant's replies:

Q: . . . In 1989 on the MMPI you were asked, "I have never had a fainting spell." You answered false. Would you agree with me that that had meant that you had had a fainting spell?

A: Well, I think from running track. I mean, you really end up keeled over and exhausted and you are very faint after a half mile race or a mile race and a lot of times you do pass out for a few seconds.

Q: When you took the MMPI in 1992 you said the answer was true, the opposite of what you had answered earlier. Would you agree with me that both of those answers can't be correct?

A: I've never had a fainting spell. I would agree with you that on different days, on whatever drugs I was on when I took the test, that I would probably answer that question either way.

Q: But if you had indicated that you had actually had a fainting spell in 1989, it would be inconsistent to say you had never had a fainting spell as of 1992, right? History doesn't flow that direction.

A: No, sir, but you have to understand that logic does not flow that direction either.

Q: Let me get this straight. Are you saying that it's medications which have caused you to answer things differently over time? Is that what I just heard you to say?

A: No, I think you are trying to put words in my mouth. That's one possibility of many.

Q: To the question, "I've never had a fit or convulsion,[sic] in 1989 you said false.

A: What's a fit?

Q: Well, you were asked the question so we're going to leave it up to you. But that would imply in 1989 you felt you had had a fit or convulsion, correct?

A: Not convulsions. Fits of anger, yes.

Q: But then in 1992, your answer to the same question was true, I had never had one. So once again in '89 you said you had, but in '92 you said you hadn't, and history doesn't run that way, does it?

A: Well, I'll tell you what, from day to day our opinions change, don't they, and the way we think changes.

Q: Well, if you had had a car wreck in 1987 and you were asked the question in 1989, did you have a car wreck and you said yes, then you are asked the same question again in 1992 and you said no, those would be inconsistent answers, wouldn't they?

A: Well, as I said, there are many factors involved. Attention span, drugs, whether or not you feel good that day.

Q: Ulterior motives?

A: Ulterior motives, certainly.

(Tr. at 80-82.)

Q: In 1989 when you were asked, "When I'm cornered I have to tell that portion of the truth which is not likely to hurt me." You said true, I don't want to tell that portion of the truth?

A: That is likely to hurt me.

Q: Yes.

A: That's right, same as you.

Q: And in 1992 you said no, that's false, I will tell that portion of the truth?

A: Well, in 1992 I was so pissed off at all you people that I was quite ready to do that.

Q: So you changed your mind between '89 and '92?

A: Yeah, things change. The more you get cheated and screwed, the less you want to hold on to some of those ideas which mom and daddy taught you when you were going to church because it ain't like that no more.

(Id. at 83-84.)

After considering claimant's explanation and the other evidence in this case, the Court agrees that claimant has an idiosyncratic manner of answering questions but does not share Dr. Stratford's simple assessment that claimant's manner of

answering questions explains his test answers. I am also unpersuaded that his answers were due to drugs or other factors. Rather, I am persuaded that claimant was in fact not truthful in answering test questions. His answers at trial were disingenuous and evidence of his ability to twist the facts to suit himself.

d. There was no evidence indicating that psychosis causes or contributes to the manner of his answers. Moreover, there is other evidence in this case indicating that prior to the needle stick the claimant had an unusual and idiosyncratic outlook on life and style. (See Findings 2, 3, 30-33 and 84.)

95. To diagnose malingering, Dr. Stratford said he would focus on four factors:

I would look for overt secondary gain, first of all; why now? Secondly, what is the long-term clinical history? Thirdly, what is the nature and quality of their symptoms and how consistent are they with a diagnosis of psychosis? Fourth, is there any collateral support for that at all?

For example, in a jail I would talk to fellow cell mates or watch television tapes or recorded interview. I would look at any previous medical history, psychiatric history.

(Stratford Dep. I at 14.) But he added at trial that to make a diagnosis of malingering he would have to "catch them [the patient] in the act," or catch them "red-handed." (Tr. at 198-99.)

96. In light of the test results and the possibility of malingering, Dr. Stratford believed that it was necessary to verify claimant's assertions by "collateral contacts," i.e., contacts with third persons who could verify or dispute claimant's story. (Stratford Dep. I at 11, 16; Tr. at 201.) Despite that belief, Dr. Stratford's collateral contacts were belated and half-hearted. While he claimed at trial to have made collateral contacts "from the get-go" and prior to December of 1991 (Tr. at 215-17), his file and his notes do not reflect any contacts prior to April 1992 (*id.* at 217). Moreover, when asked by the Court whether he was sure he had contacts prior to December 1991, he replied that he wasn't. (*Id.*) Dr. Stratford also relied initially on written reports of collateral contacts which were prepared and submitted by claimant himself. (Ex. 2-172 to 2-180.)

97. Dr. Stratford did not contact persons on claimant's so-called enemies list (*id.* at 181; Tr. at 265-66) or read claimant's diary. (Tr. at 240). He also repudiated his own handwritten office note regarding his interview of Spealman. According to his note, Spealman told him that claimant became depressed in 1991. (*Id.* at 391.) Dr. Stratford conceded that her observation was at odds with his own observation of depression in 1989 and 1990. (*Id.*) However, Dr. Stratford then repudiated the note, testifying that his recollection was different from the note and that Spealman had indicated that claimant had changed immediately after the needle stick. (*Id.* at 391-93.) His testimony in this regard was not credible.

98. After listening to Dr. Stratford's testimony, and considering his failure to initially pursue collateral contacts; his failure to contact individuals he knew might have adverse information; his repudiation of his own office notes concerning his conversation with Spealman; and his unhalting and unwavering adherence to his original opinion despite new information indicating that claimant was not always truthful with him and was already focused on a lawsuit when first seen on October 2, 1989, I am persuaded that Dr. Stratford lost his objectivity concerning the claimant.

99. On the other hand, I was impressed and persuaded by the testimony of both Drs. Faust and Rogers, especially Dr. Rogers, whom I felt was thorough, professional, and knowledgeable, and the best expert witness I have ever observed. Dr. Rogers examined claimant over a two day period on June 23-24, 1995. (*Id.* at 663.) His examination consisted of both structured and unstructured interviews and a series of psychological tests. (*Id.* at 663.) Excluding time spent administering psychological tests, Dr. Rogers spent ten hours examining claimant. (*Id.* at 665.) I am persuaded that he was objective in his examination and note that in the last five cases in which Dr. Rogers has been asked to examine individuals to determine if they were malingering, there were two cases in which other experts opined that individuals were malingering but Dr. Rogers came to the contrary, non-malingering conclusion. (*Id.* at 662.) Dr. Rogers was more knowledgeable than Dr. Stratford in testing for malingering and in identifying malingerers.

100. Taking everything into consideration, it was Dr. Rogers' unequivocal opinion that "he [claimant] is malingering mental disorders." (*Id.* at 708.) He "found no evidence of there being a mental disorder caused by the needle stick" and had the further opinion that claimant is not suffering from any mental disorder which impairs his ability to work. (*Id.* at 708-09.)

101. Dr. Roger's opinion was supported by numerous facts. The number and nature of the atypical features of claimant's alleged mental disorder were extraordinary. Moreover, the evidence presented to the Court showed that claimant falsely answered psychological tests in a deliberate effort to "fake bad" and that he is knowledgeable concerning psychological matters and capable of fabricating and feigning psychiatric symptoms. From virtually the moment of the needle stick, he has been intent on pursuing legal action on account of his injury. His reports to Dr. Stratford concerning his activities were sometimes incomplete or exaggerated. In the Court's assessment, his explanations at trial were smoothly delivered but often incredible and unbelievable.

102. After reviewing and carefully considering all of the evidence in this case, I find that claimant's mental illness is malingered. I further find that he is not suffering from a schizoaffective disorder or any other psychotic diagnosis. While he may well have some depression, that is a life-long problem and a personality characteristic which is not attributable to the industrial accident.

103. I find that claimant is able to work as a respiratory therapist and that his case for disability was fabricated.

CONCLUSIONS OF LAW

1. Claimant has the burden of proving an entitlement to benefits by a preponderance of the probative, credible evidence. *Dumont v. Wickens Brothers Construction Co.*, 183 Mont. 190, 201, 598 P.2d 1099, 1105 (1979). In this case he must establish that he is totally disabled on account of his industrial accident.
2. Claimant has failed to carry his burden of proof. Indeed, the Court finds that the evidence preponderates against him. As found, he has fabricated and feigned mental illness in an attempt to advance his legal claims. He is not physically or psychologically disabled on account of his industrial accident.
3. EBI/Orion has paid benefits under a reservation of rights. In light of the decision in this case, it is not liable for further benefits.
4. Since claimant has not prevailed, he is not entitled to attorney fees, costs or a penalty. Moreover, even had he prevailed the insurer's defense of this case was reasonable and provides no basis for an attorney fee award or a penalty.

JUDGMENT

1. Claimant is not disabled on account of his January 29, 1989 industrial injury and is not entitled to further compensation or medical benefits from the EBI/Orion.
2. Claimant is not entitled to attorney fees, costs, or a penalty.
3. This Judgment is certified as final for purposes of appeal.
4. Any party to this dispute may have 20 days in which to request a rehearing from these Findings of Fact, Conclusions of Law and Judgment.

DATED in Helena, Montana, this 8th day of February, 1996.

(SEAL)

/s/ Mike McCarter

JUDGE

c: Mr.Charles E. McNeil

Mr. Steven S. Carey

Mr. Richard R. Buley

Submitted: September 5, 1995

1. Pages 138 to 154 of Exhibit 2 are a typewritten transcription of Dr. Stratford's handwritten office notes from April 27, 1992 to December 5, 1994. The handwritten notes are at pages 103 to 137 of Exhibit 2.

2. The American Psychiatric Association, Diagnostic and Statistical Manual of Mental Disorders 292 (4th ed. 1994) states:

The essential feature of Schizoaffective Disorder is an uninterrupted period of illness during which, at some time, there is a Major Depressive, Manic, or Mixed Episode concurrent with symptoms that meet Criterion A for schizophrenia (Criterion A). In addition, during the same period of illness, there have been delusions or hallucinations for at least 2 weeks in the absence of prominent mood symptoms (Criterion B). Finally, the mood symptoms are present for a substantial portion of the total duration of the illness (Criterion C). The symptoms must not be due to the direct physiological effects of a substance (e.g., cocaine) or a general medical condition (e.g., hyperthyroidism or temporal lobe epilepsy) (Criterion D). To meet criteria for Schizoaffective Disorder, the essential features must occur within a single uninterrupted period of illness. . . .

3. "Psychosis" is a general term encompassing mental disorders "characterized by gross impairment in reality testing as evidenced by delusions, hallucinations, markedly incoherent speech, or disorganized and agitated behavior," and includes schizoaffective disorder. Dorland's Illustrated Medical Dictionary 1385 (27th ed. 1988)