

IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

2000 MTWCC 20

WCC No. 9904-8200

TIM PATRICK

Petitioner

vs.

STATE COMPENSATION INSURANCE FUND

Respondent/Insurer for

KYUS BROADCASTING

Employer.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND JUDGMENT

Summary: 48-year-old claimant with extensive medical problems including thirteen abdominal surgeries had been required to take disability retirement from Veterans Administration, but secured employment with radio station as a switcher and sales representative. After tripping over a cable at work, he suffered acute low back pain. The insurer accepted liability and began paying benefits. After a "fraud flag" in the insurer's computer system indicated a person with claimant's recent injury should be back to work, the adjuster focused efforts on proving claimant could work, including hiring a private investigator and successive vocational consultants. Insurer terminated TTD benefits and refused rehabilitation benefits. Claimant filed petition demanding rehab benefits.

Held: Where insurer essentially limited the rehabilitation evaluation to the gathering of information to support the insurer's prior conclusion claimant suffered no wage loss, the evaluation was woefully inadequate and fell far short of the "careful assessment of the worker's realistic and reasonable prospects for obtaining employment" or the "further assessment of the realistic wages he or she is likely to earn" required by this Court in [Leastman v. Liberty Mutual Fire. Ins. Co.](#), 1999 MTWCC 2. So that the insurer would not take advantage of its unreasonable delay in creating and implementing a rehabilitation plan, claimant awarded retroactive temporary total disability benefits. Penalty and attorneys' fees also awarded. (After decision, parties settled and presented a Stipulated Judgment to the Court, which then issued its Order Nunc Pro Tunc For Entry of Judgement

and Dismissal with Prejudice, *Patrick v. State Compensation Insurance Fund*, 2000 MTWCC 20A.)

Topics:

Constitutions, Statutes, Regulations and Rules: Montana Code: 39-71-611, MCA (1997). Attorneys Fees awarded where insurer unreasonably limited rehabilitation evaluation to the gathering of information to support the insurer's prior conclusion claimant suffered no wage loss. Facts suggesting unreasonable delay and denial of rehab benefits included adjuster's hiring of private investigator based only a computer generated "fraud flag," which in turn was based only on claimant's failure to return to work within a predicted period of time, and did not consider claimant's serious preexisting condition upon which work injury was imposed; adjuster's apparent communication to investigator, without any support, that there was no objective evidence of injury and treating physician was "making matters worse"; referral for neuropsychological evaluation without basis; provision of report unfavorable to claimant, but not report favorable to claimant, to expert; and general tendency to ignore evidence favorable to claimant while seeking opinions to support adjuster's conclusion. (After decision, parties settled and presented a Stipulated Judgment to the Court, which then issued its Order Nunc Pro Tunc For Entry of Judgement and Dismissal with Prejudice, *Patrick v. State Compensation Insurance Fund*, 2000 MTWCC 20A.)

Constitutions, Statutes, Regulations and Rules: Montana Code: 39-71-2907, MCA (1997). Penalty awarded where insurer unreasonably limited rehabilitation evaluation to the gathering of information to support the insurer's prior conclusion claimant suffered no wage loss. Facts suggesting unreasonable delay and denial of rehab benefits included adjuster's hiring of private investigator based only a computer generated "fraud flag," which in turn was based only on claimant's failure to return to work within a predicted period of time, and did not consider claimant's serious preexisting condition upon which work injury was imposed; adjuster's apparent communication to investigator, without any support, that there was no objective evidence of injury and treating physician was "making matters worse"; referral for neuropsychological evaluation without basis; provision of report unfavorable to claimant, but not report favorable to claimant, to expert; and general tendency to ignore evidence favorable to claimant while seeking opinions to support adjuster's conclusion. (After decision, parties settled and presented a Stipulated Judgment to the Court, which then issued its Order Nunc Pro Tunc For Entry of Judgement and Dismissal with Prejudice, *Patrick v. State Compensation Insurance Fund*, 2000 MTWCC 20A.)

Attorneys Fees: Unreasonable Denial or Delay of Payment. Attorneys Fees awarded where insurer unreasonably limited rehabilitation evaluation to the gathering of information to support the insurer's prior conclusion claimant suffered no wage loss. Facts suggesting

unreasonable delay and denial of rehab benefits included adjuster's hiring of private investigator based only a computer generated "fraud flag," which in turn was based only on claimant's failure to return to work within a predicted period of time, and did not consider claimant's serious preexisting condition upon which work injury was imposed; adjuster's apparent communication to investigator, without any support, that there was no objective evidence of injury and treating physician was "making matters worse"; referral for neuropsychological evaluation without basis; provision of report unfavorable to claimant, but not report favorable to claimant, to expert; and general tendency to ignore evidence favorable to claimant while seeking opinions to support adjuster's conclusion. (After decision, parties settled and presented a Stipulated Judgment to the Court, which then issued its Order Nunc Pro Tunc For Entry of Judgement and Dismissal with Prejudice, *Patrick v. State Compensation Insurance Fund*, 2000 MTWCC 20A.)

Benefits: Rehabilitation Benefits. Where insurer essentially limited the rehabilitation evaluation to the gathering of information to support the insurer's prior conclusion claimant suffered no wage loss, the evaluation was woefully inadequate and fell far short of the "careful assessment of the worker's realistic and reasonable prospects for obtaining employment" or the "further assessment of the realistic wages he or she is likely to earn" required by this Court in *Leastman v. Liberty Mutual Fire. Ins. Co.*, 1999 MTWCC 2. So that the insurer would not take advantage of its unreasonable delay in creating and implementing a rehabilitation plan, claimant awarded retroactive temporary total disability benefits. Penalty and attorneys' fees also awarded. (After decision, parties settled and presented a Stipulated Judgment to the Court, which then issued its Order Nunc Pro Tunc For Entry of Judgement and Dismissal with Prejudice, *Patrick v. State Compensation Insurance Fund*, 2000 MTWCC 20A.)

Insurers: Adjusters. Penalty under 39-71-2907, MCA (1997) awarded where adjuster unreasonably limited rehabilitation evaluation to the gathering of information to support her prior conclusion claimant suffered no wage loss. Facts suggesting unreasonable delay and denial of rehab benefits included adjuster's hiring of private investigator based only a computer generated "fraud flag," which in turn was based only on claimant's failure to return to work within a predicted period of time, and did not consider claimant's serious preexisting condition upon which work injury was imposed; adjuster's apparent communication to investigator, without any support, that there was no objective evidence of injury and treating physician was "making matters worse"; referral for neuropsychological evaluation without basis; provision of report unfavorable to claimant, but not report favorable to claimant, to expert; and general tendency to ignore evidence favorable to claimant while seeking opinions to support adjuster's conclusion. (After decision, parties settled and presented a Stipulated Judgment to the Court, which then issued its Order Nunc Pro Tunc For Entry of Judgement and Dismissal with Prejudice, *Patrick v. State Compensation Insurance Fund*, 2000 MTWCC 20A.)

Malingering. Penalty and attorneys fees awarded where adjuster unreasonably limited rehabilitation evaluation to the gathering of information to support her prior conclusion claimant suffered no wage loss and was malingering. Facts suggesting unreasonable delay and denial of rehab benefits included adjuster's hiring of private investigator based only a computer generated "fraud flag," which in turn was based only on claimant's failure to return to work within a predicted period of time, and did not consider claimant's serious preexisting condition upon which work injury was imposed; adjuster's apparent communication to investigator, without any support, that there was no objective evidence of injury and treating physician was "making matters worse"; referral for neuropsychological evaluation without basis; provision of report unfavorable to claimant, but not report favorable to claimant, to expert; and general tendency to ignore evidence favorable to claimant while seeking opinions to support adjuster's conclusion. (After decision, parties settled and presented a Stipulated Judgment to the Court, which then issued its Order Nunc Pro Tunc For Entry of Judgement and Dismissal with Prejudice, [*Patrick v. State Compensation Insurance Fund*](#), 2000 MTWCC 20A.)

Penalties: Insurers. Penalty under 39-71-2907, MCA (1997) awarded where insurer unreasonably limited rehabilitation evaluation to the gathering of information to support the insurer's prior conclusion claimant suffered no wage loss. Facts suggesting unreasonable delay and denial of rehab benefits included adjuster's hiring of private investigator based only a computer generated "fraud flag," which in turn was based only on claimant's failure to return to work within a predicted period of time, and did not consider claimant's serious preexisting condition upon which work injury was imposed; adjuster's apparent communication to investigator, without any support, that there was no objective evidence of injury and treating physician was "making matters worse"; referral for neuropsychological evaluation without basis; provision of report unfavorable to claimant, but not report favorable to claimant, to expert; and general tendency to ignore evidence favorable to claimant while seeking opinions to support adjuster's conclusion. (After decision, parties settled and presented a Stipulated Judgment to the Court, which then issued its Order Nunc Pro Tunc For Entry of Judgement and Dismissal with Prejudice, [*Patrick v. State Compensation Insurance Fund*](#), 2000 MTWCC 20A.)

Surveillance. Penalty and attorneys Fees awarded where insurer unreasonably limited rehabilitation evaluation to the gathering of information to support the insurer's prior conclusion claimant suffered no wage loss. Facts suggesting unreasonable delay and denial of rehab benefits included adjuster's hiring of private investigator to conduct surveillance based only a computer generated "fraud flag," which in turn was based only on claimant's failure to return to work within a predicted period of time, and did not consider claimant's serious preexisting injury, which impacted recovery time from work injury. (After decision, parties settled and presented a Stipulated Judgment to the Court, which then

issued its Order Nunc Pro Tunc For Entry of Judgement and Dismissal with Prejudice, *Patrick v. State Compensation Insurance Fund*, 2000 MTWCC 20A.)

¶11 The trial in this matter was held on October 19, 1999, in Billings, Montana. Petitioner, Tim Patrick (claimant), was present and represented by Mr. Marvin L. Howe. Respondent, State Compensation Insurance Fund, was represented by Mr. Greg E. Overturf. A trial transcript has not been prepared.

¶12 Exhibits: Exhibits 1 through 31 were admitted without objection.

¶13 Witnesses and Depositions: The claimant, Linda Patrick, Shauna Foley, and Delane Hall were sworn and testified. The parties also submitted the depositions of claimant, Scott K. Ross, M.D., Bob Zadow, and J.R. Grierson, M.D., for the Court's consideration.

¶14 Pretrial Motions: Petitioner moved to amend the petition to include the issue of whether claimant is entitled to permanent partial disability benefits if not to rehabilitation benefits. The motion was **granted**.

¶15 Issues Presented: The issues, as restated by the Court, are as follows:

1. Whether claimant is entitled to vocational rehabilitation benefits pursuant to section 39-71-1006, MCA.
2. If claimant is not entitled to vocational rehabilitation benefits, whether he is entitled to permanent partial disability benefits pursuant to section 39-71-703, MCA.
3. Whether claimant is entitled to a 20% penalty pursuant to section 39-71-2907, MCA.
4. Whether claimant is entitled to reasonable costs and attorneys fees in accordance with section 39-71-611, MCA.

¶16 Having considered the Pre-trial 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

¶17 Claimant is presently 48 years old.

¶18 Claimant was a credible witness.

¶19 After graduating from high school, claimant served seven years in the military, including three tours in Vietnam. (Patrick Dep. at 9.) While in the service, claimant developed kidney problems, underwent kidney surgery, and received a 10% military disability rating. (Ex. 9 at 3.)

¶10 Following discharge from the service, claimant returned to Montana, where he worked briefly for United Parcel Service and Burlington Northern Railroad. He then began a twenty-year career with the Veterans Administration (VA) in Miles City. Initially, claimant worked as an assistant plumber and janitor. Through on-the-job training and self-study, he was promoted to a high pressure boiler plant operator, a job he held for several years.

¶11 Around 1984 and 1985, claimant worked the night shift and attended Miles City Community College, where he received an associate of science degree in electronics. Claimant has a life-long interest in electronics and has been a ham radio operator since youth. After receiving his A.A. degree, claimant became an electronics technician for the VA, where he "repaired everything that was electronic, or electrical, and also was responsible for the periodic maintenance of several air handling machines, oxygen machines, and X-ray processors." (Patrick Dep. at 12.)

¶12 While working for the VA, claimant continued to have kidney problems. Over the years he underwent several operations, from which he developed weakness in his abdominal wall. Claimant explained: "It started as a kidney condition, and then adhesions wrapped around the intestines, and I got gangrene. Then I rejected several meshes [to hold the abdominal wall] and had a running bout with staph infection. You know, on and on it went." (Patrick Dep. at 13-14.) Dr. John Grierson, who has treated claimant for over 20 years, testified that perforated diverticulitis required multiple surgeries and led to multiple hernias, as well as chronic problems with tissue in the abdominal wall. (Grierson Dep. at 7-8.)

¶13 During the early 1990s, claimant was injured at work with the VA. He was assisting in moving a patient when the patient began to fall. The claimant attempted to catch him and the patient fell on claimant, resulting in dislocation of wire mesh in claimant's abdomen. That led to claimant's **13th abdominal surgery**, after which the VA required him to take a disability retirement. At the time of his involuntary retirement, claimant had been continuing his studies of x-ray processors and other equipment through Kodak Company and had intended to continue his career with the VA.

¶14 After recovering from the VA injury and surgery, claimant initially worked his own ranch. He testified he had difficulty with the work, "but I did it." Medical records from the Garberson Clinic for the years 1992 through 1995 indicate claimant was treated several times for strain to his abdomen. An entry from March 31, 1992, states claimant "[h]ad an injury to the abdominal wall when he was lifting a plow with a crowbar." (Ex. 22 at 5.) On July 15, 1993, Dr. Grierson reported: "Patient comes in for recheck continuing to complain of intermittent episodes of left sided abdominal pain. Patient continues to have problems with any straining or lifting." (*Id.* 22 at 4.) An entry from October 12, 1994, states:

A number of abdominal operations with an incisional hernia almost [sic] recently replaced with mesh over a year ago. Yesterday, 10/11/94 while putting in a corner post on a fence

(railroad tie size), corner post slipped, he twisted and grabbed the thing. He had immediate onset of burning pain just above the incision in the midline.

(*Id.* at 2.)

¶15 For many years prior to the industrial accident at issue herein, Dr. Grierson prescribed narcotic medication for pain associated with claimant's abdominal problems. He had also advised claimant to limit lifting and straining activities due to his abdominal condition. (Grierson Dep. at 34.)

¶16 In 1996 claimant started work for KYUS as a part-time switcher and sales representative, but almost immediately went to full time, often working overtime. He worked both as a switcher and selling ads for the station. (Patrick Dep. at 17.) Claimant testified that when he first started, "not only did I sell the ad, I shot the ad then went back and edited the ad and voiced it and put it together." (*Id.* at 16.) Eventually he "went to straight station engineer. . . . I was in charge of all of the switchers, making up the schedule, keeping the transmitter on line, basically doing everything needed to keep a TV station up and running." (*Id.*) In performing his job, claimant lifted VCRs and other equipment and pushed and pulled equipment.

¶17 Claimant worked as chief engineer for KYUS for at least a year, often working six or seven days a week and over eight hours a day. Claimant sometimes had abdominal pain, but continued working.

¶18 On January 31, 1998, claimant was called to the station early because of a problem with one of the satellite dishes. While working on the problem, he tripped "over one of the grounding rods backwards" and was knocked unconscious. (*Id.* at 18.) He was taken by ambulance to the Holy Rosary Health Center in Miles City, where he was treated. He reported pain in his right hip and lower back area. (Ex. 2 at 1.) Three days later, he returned and reported "acute low back pain." (*Id.* at 2.)

¶19 At the time of the claimant's industrial accident KYUS was insured by the State Fund. A claim for compensation was submitted to the State Fund in early February 1998. (Ex. 1.) The State Fund accepted liability for the claim and began paying medical and compensation benefits.

¶20 Although Dr. Grierson was claimant's regular physician, claimant was told by another employee of KYUS that he would have to be treated by the "company doctor," Dr. Edwin Stickney. Dr. Stickney did treat him. His first notation, on February 3, 1998, indicates claimant "[i]s pretty well stove up and has a lot of spasm so I sent him to PT [physical therapy]." (Ex. 6 at 3.)

¶21 On February 9, 1998, Dr. Stickney noted claimant "[r]eturns with the report that he has had a couple of falls with his right leg giving way suddenly. . . . He has been going to

Physical Therapy. Still has a lot of pain." (*Id.* at 4.) Dr. Stickney's physical examination indicated "definite weakness both on flexion and extension of right knee . . ." (*Id.*) A few days later, Dr. Stickney prescribed a back brace, then told claimant to remain off work for two weeks or until resolved. (*Id.* at 6.)

¶22 During February 1998, Shauna Foley, the claims adjuster in charge of claimant's case, requested medical management and rehabilitation services from Crawford and Company. Debra Edwards, R.N. (Edwards), a medical services consultant, and Dennis McLuskie, a vocational consultant, were assigned to the case.⁽¹⁾ (Ex. 13 at 78, 79.)

¶23 Claimant was provided with a list of managed care physicians approved by the State Fund and apparently directed to choose a treating physician from that list.⁽²⁾ He chose Dr. Robert S. Schultz, an orthopedic surgeon practicing in Billings. Dr. Schultz thereafter examined claimant on February 23, 1998. (Ex. 19 at 7.) Edwards attended the examination.

¶24 Dr. Schultz's impression was "lumbar strain with mild radiculopathy." (*Id.*) He noted claimant "moves reasonably comfortably around the room" and other signs were normal. He found "straight leg raising sitting and supine both cause low back discomfort, no leg pain." (*Id.*) Although noting lumbar spine films were relatively unremarkable, Dr. Schultz interpreted an MRI scan as showing degenerative disk disease at the L4-5 and L3-4 levels of the lumbar spine. (*Id.*) He recommended conservative treatment and stated claimant "needs to stop smoking, be weaned off of his current narcotic pain medication, perhaps be fit with a corset and continued on his therapy program with the intent on getting him back to work sometime in the next four to six weeks." (*Id.*) In recommending weaning from narcotic pain medication, there is no indication in Dr. Schultz's office note that he gave consideration to claimant's abdominal pain and history of 14 abdominal surgeries, or that he reviewed medical records pertaining to that history.

¶25 On February 27, 1998, Dr. Stickney reviewed results of the MRI. He also found "minimal degenerative changes involving the lumbar spine," but noted "[o]therwise normal specifically with no herniation of disks etc." (Ex. 6 at 8.) On examination, Dr. Stickney found "straight leg raising only to about 20 degrees on the right and 30 degrees on the left." (*Id.*) After learning of Dr. Schultz's recommendation that claimant quit smoking, Dr. Stickney prescribed Zyban and began a course of hypnotherapy. At the request of the physical therapist, Dr. Stickney also prescribed a TENS (transcutaneous electrical nerve stimulation) unit.

¶26 On March 19, 1998, Edwards wrote to Shauna Foley (Foley). She noted that Dr. Schultz had previously "indicated that he saw no reason for Mr. Patrick to obtain medical care in Billings, and he would refer the claimant back to Dr. Stickney for treatment recommendations, as well as return-to-work instructions." (Ex. 13 at 74.) Nevertheless, as Edwards' letter indicates, she was instructed by Foley to set up a further appointment with Dr. Schultz: "**Per your instructions**, I have scheduled a follow-up appointment for Mr.

Patrick to see Dr. Schultz on 3/27/98 at 11:30 a.m." (*Id.* at 75; emphasis added.) Her letter went on to say:

A vocational referral has been made to Mr. Dennis McLuskie, C.R.C., and he will provide me with a job analysis to present to Dr. Schultz at that appointment. The claimant has been notified of the appointment. **He has also been notified that, per your instructions, he will not see Dr. Stickney for follow-up.**

I received a telephone call from Dr. Stickney on 3/18/98. **Dr. Stickney indicated that he was concerned that Mr. Patrick was being sent to Billings for additional medical care. He indicated, "That trip to Billings is too hard on him."** Dr. Stickney felt that he was following through with Dr. Schultz' recommendations, as he had prescribed a smoking cessation program for the claimant, and the claimant had declined having any Epidural steroid injections, which Dr. Stickney stated he doubted would be of benefit. I informed Dr. Stickney that a job analysis would be performed on Mr. Patrick's job, and he indicated "I support him returning to work, but I do not want him returning to work if all he does is sit all day long." **Dr. Stickney** went on to state that he would support Mr. Patrick returning to work in a modified position or with modified hours, and **requested that he be allowed to remain the treating physician for Mr. Patrick.**

I have left you a voice mail message requesting that you contact me regarding Dr. Stickney's request and to further advise me regarding additional medical case management services. I spoke with the claimant regarding the follow-up appointment with Dr. Schultz and the intent to proceed with a return to work effort, and he indicated "I'm having too much pain to return to work". Mr. Patrick indicated that he is continuing to use a TENS Unit under the advisement of his Physical Therapist, and stated, "It's helping me some."

I will await your advisement regarding proceeding with the appointment with Dr. Schultz on 3/27/98, and further advisement regarding medical case management activities.

(*Id.*, emphasis added.) Despite the information furnished by Edwards, Foley persisted in her request to have claimant return to Dr. Schultz.

¶27 Claimant saw Dr. Schultz again in Billings on March 27, 1998, with Edwards in attendance. (Ex. 19 at 5.) Dr. Schultz noted at that time that claimant had stopped smoking, was using less narcotics, and was making some progress in physical therapy. Claimant reported continued back pain, but diminishing leg problems. Dr. Schultz recommended continued non-surgical care, decrease of narcotics, and return to work "even in a sedentary capacity for part-time." (*Id.*) However, no job analyses were presented or reviewed at that time. Dr. Schultz placed the following general restrictions upon claimant:

no bending, stooping, and that he be allowed to change positions as necessary. He should avoid climbing stairs, ladders, crawling, etc. Weight limits arbitrarily would be 5 pounds frequent, 10 pounds intermittent.

(Id.) Dr. Schultz also noted: "His treating physician of record continues to be Doctor Stickney, which is the patient's choice. I would recommend that he be followed and managed for patient convenience by Doctor Stickney." *(Id.)*

¶28 Around the beginning of April, Foley hired Ronald Maki (Maki), a private investigator, to videotape claimant. Foley testified claimant's case triggered a "fraud flag" in the State Fund's computer system. She believed this was either because claimant had a prior work-related injury (at the VA) or because he did not return to work within the number of weeks allotted by the system for recovery from back strain, but was unsure which. During her testimony at trial, Foley expressed difficulty remembering other details concerning her adjustment of the claim. She was unable to refer to State Fund's file to refresh her recollection because she did not bring the file to Billings for trial. I find that unusual. In almost every case over which I have presided, claims adjusters for the State Fund, as well as other insurers, have brought their claim files with them when expected to testify, thus enabling them to refresh their recollections during their testimony. In light of the allegations of unreasonable conduct by the State Fund and Foley's lack of recollection of critical matters concerning adjustment of the claim, her failure to bring the file is even more baffling.

¶29 Foley gave no reason why a prior industrial injury triggers a fraud inquiry. Foley provided no information indicating that a prior workers' compensation injury is a significant indicator of fraud or that anything about claimant's prior claim with the Veterans Administration was suspicious. She was also unable to say whether the fact that a claimant fails to return to work within the expected time fixed by the State Fund's computer program routinely triggers surveillance. She provided no documentation or evidence that failing to return to work within the precise time established by the computer program is a significant fraud predictor. Her explanation for the surveillance was wholly unconvincing and unsatisfactory. At the time the surveillance was ordered, claimant was two months post-injury. His injury came on top of a serious and painful preexisting abdominal condition. Foley acknowledged that she was aware claimant had undergone 14 surgeries. Nothing in either Dr. Stickney's or Dr. Schultz's reports provided a basis for suspicion that claimant was malingering or exaggerating his back condition. Neither physician had found him at MMI, nor had either physician approved a full return to work.

¶30 Some indication of Foley's attitude toward the claim is found in an undated "New Case Assignment" record of private investigator Maki. Judging from context, this document contains Maki's notes based upon information he received from the State Fund, most probably from Foley. Under the section headed "[c]omments," the following is written: "He

has no objective medical evidence of injury. Stickney MD is making matters worse." (Ex. 27 at 9.)

¶131 Investigator Maki videotaped claimant on April 8 and 9, 1998 (ex. 27) and the Court has reviewed the tapes. On April 8th claimant is shown intermittently moving around outside his residence not using a cane, however, he exhibits a limp and guarded gait. During the afternoon of April 8th, the video shows claimant using a cane when visiting the Holy Rosary Health Center. On the morning of April 9th, claimant is also shown using a cane when entering and leaving KYUS.⁽³⁾ Claimant's limp and gait on those occasions appear consistent with his movements outside his own home. While the investigative report makes much of claimant's failure to use a cane around his home, claimant testified he reserves use of the cane for circumstances where he might be injured if his leg gives out, such as in a parking lot. Even the investigative report noted that claimant's gait became less normal through the day and that claimant often stopped to rest in the course of his activities. (*Id.*) The videotapes do not discredit claimant's reports to his physicians or his claim of disability.

¶132 Edwards wrote to Foley on April 30th, regarding a job analysis performed at KYUS, which she attended at Foley's request. Edwards stated:

As we discussed, Mr. Patrick's employer indicated "I can't put somebody else out of a job in order to put him back to work." An alternative job analysis for a Switcher was also performed by Mr. McLuskie on that date.

At your request, I forwarded correspondence to Mr. Patrick's treating physician, Dr. Stickney, on 4/16/98. The content of this correspondence included questions for Dr. Stickney to address regarding MMI, return to work, and permanent physical restrictions. Attached is the response I received from Dr. Stickney, which we discussed by phone today.

(Ex. 13 at 55.) The response from Dr. Stickney does not appear within the correspondence admitted at trial. Foley testified that claimant's time-of-injury job was not medically approved.

¶133 Meanwhile, shortly after the job analysis was done, KYUS went off the air and out of business. (See Ex. 6 at 15.)

¶134 On April 27, 1998, claimant was examined by Dr. Stickney, whose medical records state:

Timothy Patrick, Sr. - Returns with the discouraging news that the station has been discontinued here in Miles City and he and all of the employees have been let go, so that puts an entirely different aspect on his whole situation and **may get us into the realm of vocational rehabilitation.**

Also about a week ago he was walking his dog and had felt so good that he did not feel it necessary to have his cane. His right leg suddenly gave way and he fell injuring his right buttock which is extremely sore and also the left side of his chest where [there] is a long transverse incision has been sore and he is worried about this having dehisced.

(Ex. 6 at 15; emphasis added.) Dr. Stickney examined claimant and wrote that it was almost impossible for claimant to stretch out his leg. "Also there is enough spasm that it is impossible to flex the thigh at the hip very much and straight leg raising is perhaps only 20 degrees." (*Id.*) The doctor noted claimant's left side was better "but there is still pain which is referred over to the right side." (*Id.*)

¶135 Claimant returned to Dr. Stickney on May 11, 1998. The doctor noted "some improvement although his range of motion at the right hip is severely limited. Actually his muscles are pretty tight throughout." (*Id.* at 16.)

¶136 Claimant was again examined by Dr. Stickney on May 28th. Claimant continued to report problems with his right leg. Examination revealed "[s]traight leg raising on the right with some spasticity is only 30 degrees." (*Id.*) Dr. Stickney noted claimant was still off cigarettes. He also commented, "**I think that Vocational Rehabilitation is probably going to be necessary.**" (*Id.*, emphasis added.)

¶137 On June 11, 1998, someone at Crawford (probably Edwards) sent a letter to Foley outlining case management activity and plans. (Ex. 13 at 54.) It lists claimant's treating physicians as "Dr. Bruce Swarney and Dr. Schultz." Despite the letter referring to Dr. Swarney three times, there is no evidence that claimant was ever treated by Dr. Swarney. The reference was apparently in error. In any event, the letter noted that claimant had been scheduled for "IME's, including spine specialist/neuropsychologist/occupational medicine." (*Id.*) The letter noted the following goals had been met:

1. Attend consultation with Dr. Schultz for second opinion.
2. Contact Dr. Swarney⁽⁴⁾ regarding medical treatment/return to work.
3. Schedule the claimant with IME's, including spine specialist/neuropsychologist/occupational medicine.

(Ex. 13 at 54.) The letter also set out an "anticipated outcome" of the IME examination, as follows:

Anticipated Outcome: Mr. Patrick **will be determined** through his Independent Medical Examinations to be at Maximum Medical Improvement, and capable of returning to his job of injury. A modified position has also been determined during contact with the employer. [Emphasis added.]

(*Id.*)

¶138 The June 11th Crawford letter does not explain why a psychological evaluation was being pursued, or why the author expected claimant to be released to his time-of-injury job, in light of prior medical information. Foley was questioned at trial about her reason for a psychological evaluation in this case. She variously testified that the psychological evaluation was not her idea but rather Edwards', that such an evaluation "always goes to show a claimant's state of mind," and that the computer flagged claimant's case because he had not returned to work within the time prescribed by the computer. Foley also testified as to her observation that claimant's "diagnostics" were normal, claiming the doctors "couldn't add anything" and "were at wit's end." The medical records available to her do not support her testimony. They do not suggest malingering. Neither Dr. Schultz nor Dr. Stickney recorded significant depression or exaggeration, and neither physician recommended psychological evaluation or treatment. Foley's explanations were neither satisfactory nor credible.

¶139 In follow up to the plan set out in Crawford's June 11th letter, Edwards scheduled claimant to be examined in Billings by Steven Rizzolo, M.D., an orthopedic surgeon, and by Joseph McElhinny, Psy.D., a neuropsychologist.⁽⁵⁾ (Ex. 13 at 49, 51). Although Foley characterized the examinations as a medical "panel" evaluation, they were not a panel evaluation since the practitioners did not share information, confer, or reach any joint conclusions.

¶140 Dr. Rizzolo examined claimant on June 30, 1998, having previously reviewed medical records. (Ex. 14 at 2.) Claimant told Dr. Rizzolo his symptoms had improved overall, but had reached a plateau. Claimant reported a continued dull ache in his back, fluctuating in intensity and mostly to the right, with occasional "sharp shooting pain which he feels makes his leg give out." (*Id.* at 3.) Upon examination, Dr. Rizzolo noted the following:

PHYSICAL EXAMINATION reveals him to be alert, oriented x 3, and appropriate with **no evidence of abnormal illness behavior perhaps other than some mild symptom amplification**. . . . He has a very guarded restricted range of motion of his back of only 50% of normal but there is no palpable muscle spasm, no pain to deep palpation. Tension and Faber tests are negative for recreation of his pain but his straight leg raising is limited secondary to back pain on the right. Range of motion of the hips is good without significant pain. The knees are normal in alignment without crepitus, swelling, or effusion. Neurologically, his strength is normal, deep tendon reflexes are 1+¹/₂ at the ankles and 1 / 2 at the knees, toes are down going, no clonus or increased tone, skin is intact, and there is no lymphadenopathy or rashes. Abdomen shows multiple incisions and is soft, non-tender, with positive bowel sounds. He has normal pulses in the lower extremities.

(*Id.* at 4, emphasis added.)

¶141 Dr. Rizzolo diagnosed "[c]hronic low back pain," with symptoms "directly related to his industrial industry 100%." (*Id.*) He recommended tests "to rule out inflammatory or

hematologic abnormality and a **Bone Scan** to rule out acute bony abnormality." (*Id.* at 5, emphasis in original.) The doctor then concluded:

Assuming those tests are negative, it is my opinion that he is, unfortunately, at maximual medical improvement. At that point, I would recommend a Functional Capacity Evaluation but suspect that he would only be capable of working in, perhaps, a light duty capacity.

At the current time, I would recommend working within the sedentary capacity. Reviewing the enclosed job analyses, I think he is **incapable** of performing the job of TV Station Engineer because of the requirements of up to 150-180 minutes of standing at one time and the fact that he has to lift up to 50 lbs. Unfortunately, I do not think that he would be able to perform the alternative job analysis of TV Switcher. This is based upon the fact that there is up to 50 lbs of lifting. Both of these job analyses were reviewed with his current status in mind. I suspect, however, he would not be able to do it (alt. job) in the future either given the lifting requirements. A final determination would be made at the time of MMI, which again would be after the above mentioned diagnostic measures.

(*Id.*, emphasis added.)

¶42 Dr. Rizzolo commented that upon reaching maximum medical improvement (MMI), claimant would fit within DRE Lumbosacral Category II as a result of his guarded and restricted range of motion, which "would translate to a 5% whole person impairment." (*Id.*) The doctor placed current physical restrictions at sedentary work, but thought claimant would eventually be able to work at light-duty capacity. Finally, he commented: "**I found no evidence of abnormal illness behavior or secondary gain in this patient.**" (*Id.*, emphasis added.)

¶43 Dr. McElhinny examined claimant on July 14, 1998. (Ex. 15 at 1.) According to his report, the purpose of the examination was "to help describe [claimant's] current psychologic functioning as it relates to his medical condition." (*Id.*) Dr. McElhinny reviewed records, interviewed claimant, and administered three psychological assessments: the Pain Presentation Inventory (PPI), the Personality Assessment Inventory (PAI), and the Millon Clinical Multiaxial Inventory III (MCMI-III). (*Id.*)

¶44 Dr. McElhinny judged claimant as alert, well-oriented, polite, and cooperative, with above-average verbal comprehension abilities, good affective control, adequate psychological insight, and no signs of clinically relevant distress such as anxiety or depression. (*Id.*) However, he interpreted standardized assessments as demonstrating that claimant had "marked distress and significant impairment in functioning." (*Id.* at 5.) He found evidence of somatization "likely to be a chronic condition for this individual," preoccupation with health matters, and "strong needs for affiliation and attention from others." (*Id.* at 6.) Dr. McElhinny also concluded claimant reported "an exceptionally high number of atypical somatic symptoms," which "can be indicative of exaggeration, poor ego

resources, mislabeling of non-pain symptoms as being pain, and/or a globalistic lack of specificity regarding experienced pain." (*Id.*)

¶145 Dr. McElhinny reported his impressions as follows:

Mr. Patrick is a 46 year old with a long history of kidney-related problems and multiple surgeries. His lengthy medical history in this regard would, by itself, put him at a higher risk than average for somatization disorder. It is difficult to describe his personality style because of conflicting information between the psychologic self-report inventories and the interview data. **All indications are that he presented himself in an inconsistent manner on this evaluation, probably because of issues of secondary gain. The secondary gain issues appear to be obvious. Even if he could be released to his job of injury, he has no job of injury to return to and he is probably trying to avoid a release to work at this point since he would be forced to find another job like he had before in a difficult rural labor market.**

(*Id.* at 6-7, emphasis added.)

¶146 Dr. McElhinny did not testify and was not subject to cross-examination. Nonetheless, his report requires comment because it, like the surveillance films, is presented by the State Fund in support of its contentions that claimant is not entitled to rehabilitation and permanent partial disability benefits. Their only relevance is to suggest that claimant is exaggerating his disability.

¶147 Dr. McElhinny's statement that claimant is motivated by secondary gain and "is probably trying to avoid a release to work at this point" is incompetent evidence. *Linden v. Huestis*, 247 Mont. 383, 388, 807 P.2d 185, 188 (1991); see also, *Rollins v. Liberty Northwest Ins. Co.*, 2000 MTWCC 5. Even worse, his conclusion was unsupported. The medical records available to him do not indicate that claimant's symptoms or pain were medically suspect.⁽⁶⁾ Dr. Schultz had severely restricted his activities. Dr. Stickney had written that claimant was probably going to need vocational rehabilitation. In addition, I find it noteworthy that Dr. McElhinny was not provided, nor did he attempt to obtain, Dr. Rizzolo's report made two weeks earlier.⁽⁷⁾ As noted previously, Dr. Rizzolo stated he found no abnormal illness behavior during examination of claimant.

¶148 Dr. McElhinny also commented that "[claimant's] current pain symptoms may be exaggerated as a way to resist external influence while receiving high amounts of attention from medical care providers." (*Id.*) There is no evidence that claimant sought excessive attention from medical providers. Rather, there is evidence he has dutifully reported, often to Billings from Miles City, for medical examinations ordered by the insurer even after Dr. Schultz and Dr. Stickney requested that his care remain in Miles City.

Further Medical Treatment and Claims Adjustment

¶149 On August 7, 1998, claimant returned to Dr. Schultz in Billings. He reported continuing "back pain and some right leg pain." (Ex. 19 at 3.) Dr. Schultz ordered a bone scan. Dr. Schultz interpreted the scan as abnormal, noting "significant uptake in the L2 vertebral body and also in the right peri-acetabular area as well as the sacroiliac joint." (*Id.*) His report stated:

I have told him at this point I am still not sure exactly why he has the pain that he is having but certainly his bone scan does turn up abnormalities that need to be pursued further. He may have a metabolic bone disease that is the explanation for his discomfort and in fact may have something like early Padgett's [sic] disease. It is also possible that his back injury caused micro fracture in the L2 vertebrae which is still hot on the bone scan.

(*Id.*) Dr. Schultz asked claimant to provide him with a prior magnetic imaging scan for further review, and commented:

If it is not definitive after review by the radiologist then we may have him come back for an magnetic resonance imaging of his pelvis. At this point **I do not think that he has reached maximum medical improvement** and I would not put particular work restrictions on him besides those already placed by myself. His treatment remains again in limbo until we know for sure what is going on.

(*Id.*, emphasis added.)

¶150 Claimant returned to Dr. Schultz on September 2, after a "repeat MRI scan was obtained of the lumbar spine." (*Id.* at 1.) The MRI was read by three doctors. It showed chronic deformity at the L1-2, L2-3 level of the spine and minor changes in signal at the L-5 level. (*Id.*) Dr. Schultz concluded that the results of the scan "**represents probable post traumatic changes vs metabolic bone disease.**" (*Id.*, emphasis added.) Dr. Schultz noted his plan to run a serum protein test to rule out myeloma, and assuming that test was negative, he said he would then place claimant at "maximum medical healing as far as his work comp injury is concerned." (*Id.*) Finally, he recommended claimant be evaluated by Dr. Scott Ross for further care, assessment of impairment, and permanent work restrictions.

¶151 Claimant was examined by Dr. Ross on September 10, 1998. Dr. Ross was provided with many of claimant's medical records, including the report of Dr. McElhinny, which he summarized and quoted. (Ex. 18 at 6.) He did not have Dr. Rizzolo's report. (*Id.*)

¶152 Claimant reported continued low back and right hip pain to Dr. Ross, telling him that it was constantly present but worse at times. (*Id.* at 6.) Dr. Ross performed a physical examination. He reported claimant's responses to gentle palpation of his back and his movements in various tests as exaggerated. (*Id.* at 7.) He further reported Waddell's and Kummel's tests for nonanatomic, nonorganic signs as abnormal. (*Id.* at 8.) He concluded that claimant had "[s]ignificant subjective complaints of back pain without objective

findings." (*Id.*) He predicted no permanent impairment. (*Id.*) However, he found that claimant was not at maximum improvement. (*Id.*)

¶153 In his report, Dr. Ross indicates that he "discussed with the patient and his spouse the inconsistencies during the examination" and also "related that I could not find a physiological reason for his significant pain report." (*Id.*) Claimant and his wife both testified that Dr. Ross did not take a history, performed a quick (three-to-five minute) examination, and told claimant he had "tricked him" and that claimant had "severe mental problems."

¶154 Dr. Ross recommended "a two week structured and focused aggressive work conditioning program followed by a functional capacity evaluation." (*Id.* at 9.) He believed this would "objectively demonstrate the patient's current physical capabilities." (*Id.*) Dr. Ross predicted, "Following the work conditioning program and functional capacity evaluation patient should, in my opinion, be promptly and rapidly returned to gainful employment dependant on his performance during the conditioning program." (*Id.*) Finally, he recommended that "psychological issues need to be addressed in concert with his complaints of pain" and commented that claimant "may benefit significantly from counseling and pain control/coping recommendations in this regard." (*Id.*)

¶155 There is no indication that the medical case manager or the claims adjuster authorized counseling or pain control measures, however, they promptly pursued the "work conditioning" program recommended by Dr. Ross.

Physical Therapy and Functional Capacity Evaluation (FCE)

¶156 Between September 29 and November 4, 1998, claimant attended seven sessions of physical therapy. Therapist notes indicate claimant was putting good effort into exercises. (Ex. 4 at 12.)

¶157 On December 21, 1998, an FCE was conducted by exercise physiologist Todd Dundas (Dundas) of the Billings Clinic. (Ex. 8.) Claimant was rated as competitive only at the sedentary level. (*Id.* at 2.) Mr. Dundas wrote the following note to Dr. Ross regarding the evaluation:

At this time he was able to lift and carry 25# occ. He was also able to statically lift 27#. **He did appear to give his best effort.** Pn reports ranged from moderate to low intense in low back (5-7). **His results were consistent and did appear to be valid. His JAs [job analyses] were to [sic] physically demanding to approve.**

(*Id.* at 3, emphasis added.)

¶158 The FCE report was provided to Dr. Ross, who, on the same day as the FCE, examined claimant for a second time. During the December 21st evaluation, Dr. Ross noted that claimant had difficulty with deep knee bend/squat, problems with a supine straight leg raise, and pain at minimal palpation in the right sacroiliac region. (Ex. 18 at 3.) His report acknowledged he had asked Dundas "to assess the patient with regard to his effort and any inconsistencies noted," and that Dundas did not question claimant's efforts or reports of pain. Dr. Ross's assessment became: "Low back pain without objective sign of radiculopathy and no loss of structural integrity." (*Id.*) He placed claimant at MMI, with the following permanent limitations:

no lifting, pushing, or pulling over 25 pounds maximum, minimize twisting or bending of the low back on a repetitive basis, and change positions frequently, and hourly stretches previously instructed. These limits will be permanent.

(*Id.* at 4.) Contrary to his own prediction of no impairment which he made at the time of the first visit, Dr. Ross determined that claimant had a 5% whole person impairment. (*Id.* at 3.) He approved the jobs of TV station engineer and TV switcher only upon the condition that claimant's permanent limitations were accommodated.

McLuskie's Employability and Wage Loss Analysis

¶159 On December 23, 1998, Dennis McLuskie (McLuskie), who had been hired earlier by Foley to provide vocational services, forwarded Foley an "Employability and Wage Loss Analysis" regarding claimant. (Ex. 13 at 22.) The report is noteworthy for its erroneous information regarding the FCE. McLuskie said:

The results of the FCE were of little value, given the claimant's limited performance/effort.

(Ex. 13 at 23.) Regarding claimant's return-to-work potential, McLuskie concluded claimant possessed transferable skills and abilities qualifying him for direct job placement:

Potential occupational alternatives that Mr. Patrick could return to work to on a direct job placement basis, statewide, include:

Television Switcher (Light Duty) Entry Wage: \$6.00-8.00/hr

Electronics Technician (Light Duty) Entry Wage: \$5.25-7.00/hr

Radio Announcer (Light Duty) Entry Wage: \$6.00-8.00/hr

Discussion: Given the available information regarding residual physical capacities, Mr. Patrick could potentially return to work as a TV Switcher, an occupation which he has previously performed. It also appears based on his documented eye/hand coordination, manual dexterity, and fine finger coordination that Mr. Patrick could perform a wide range of electronic repair and light-duty production assembly jobs.

(*Id.* at 24.) He went on to say:

Based upon the information to date, it appears that the claimant is capable of returning to work to the alternative occupations identified, experiencing little or no potential wage loss. Therefore, the claimant's potential to benefit from additional short-term re-training has not been explored at this time. Although it seems questionable that the claimant will experience a wage loss in alternative employment, the claimant may benefit from on-the-job training assistance, in order to facilitate his return to work, as part of the job development/job placement process.

(*Id.*)

¶160 Although McLuskie acknowledged claimant might need additional assistance to actually obtain employment, and that the issue of wage loss is at least "questionable," his report concludes: "As Mr. Patrick will not sustain a wage loss when returning to work in alternative occupations, further rehabilitation services are not warranted." (*Id.* at 25.)

¶161 On February 5, 1999, McLuskie sought medical approval for jobs described in his report. He faxed to Dr. Ross an "urgent/expedited request for job analysis review," referencing the positions of radio announcer and master control operator. (Ex. 18 at 1; Ex. 13 at 5-6.) Dr. Ross approved the radio announcer position. He approved the master control operator position upon the condition that the employer accommodated claimant's need to avoid repetitive bending, twisting, and stooping. (*Id.* at 6.)

¶162 On February 12, 1999, McLuskie forwarded the job analyses to Foley with a notation that the jobs of radio announcer and master control operator "have been identified for this claimant based on his/her work experience, education/training, and projected physical restrictions." (*Id.* at 3.) He provided no analysis as to whether the claimant had any reasonable possibility of obtaining such work.

February 1999 Termination of TTD Benefits

¶163 On February 16, 1999, Foley gave claimant a 14-day notice of termination of his temporary total disability benefits. She wrote that both Dr. Schultz and Dr. Ross had found him at MMI and approved two job analyses. (Ex. 12 at 7.) In fact only Dr. Ross had found claimant at MMI and only Dr. Ross had approved the job descriptions, one of them only conditionally, a fact that Foley failed to mention.

¶164 Claimant's counsel found fault with Foley's letter on another ground. On February 24, he faxed to Foley the following message:

The purpose of this fax is to inform you that [it] is not proper to give 14 days notice by sending out the notice 6-7 days late. Your letter is dated February 16, 1999, but it was not sent to either my client or I until February 22, 1999. The 14 days should run from February 22, not February 16.

(Ex. 11 at 2.)

Further Medical History and Claims Adjustment

¶165 On February 23, 1999, claimant was treated by Dr. Grierson for persistent low-back pain and weakness in the right leg. On examination, Dr. Grierson found "marked lower lumbar and SI joint tenderness. He has marked muscle spasm. He appears to have weakness of the adductors of the right hip compared to the left." (Ex 21 at 2.) Suspecting radiculopathy, Dr. Grierson recommended another magnetic resonance imaging, noting the last MRI had been six months earlier. (*Id.*)

¶166 By letter dated March 9, 1999, Foley denied Dr. Grierson's request for a repeat MRI, noting that "authorizations for treatment other than standard office visits must be routed through Dr. Schultz, Crawford, the MCO and myself." (Ex. 12 at 6.) In response to a request by Dr. Grierson for additional records of treatment, Foley forwarded the records but admonished "that Mr. Patrick has many medical complications. Only the low back is related to the work injury." (*Id.*) Foley also informed Dr. Grierson that claimant "is at maximum medical healing on 12/21/98 with a 5% impairment on his low back and he has been released to return to work in **several light duty positions.**" (*Id.*, emphasis added.) Foley did authorize Dr. Grierson to treat claimant but provided that "any treatment other than office calls must be pre-authorized" by Dr. Schultz, Crawford, the Medical Care Organization, or herself. (*Id.*)

¶167 On April 19, 1999, claimant filed a Petition for Hearing in this Court.

¶168 By letter to Mr. Howe dated May 11, 1999, Foley reiterated that "Dr. Schultz is the treating physician for Mr. Patrick. I am allowing Dr. Grierson to treat but he does not have the authority to order any MRI's or specialized tested [sic] without going through the appropriate MCO (Crawford) and the treating physician, Dr. Schultz." (Ex. 12 at 1.)

¶169 While Foley maintained that Dr. Schultz was the treating physician, Dr. Schultz had a different view. On June 17, 1999, he wrote to Foley that "the last time that I saw Mr. Patrick was on 9-3-98. . . . In that note I recommended that Dr. Ross and/or Mr. Patrick's referring physician Dr. Stickney continue to manage this patient on a long-term basis." (Ex. 23 at 1.) Dr. Schultz stated he was not in a position to comment on claimant's current status, but

did mention the possibility of a pain management program for claimant. There is no indication his suggestion was considered by the claims adjuster or medical case manager.

Job Analysis by Delane Hall

¶70 Near the beginning of May 1999, Foley hired Delane Hall (Hall), a Certified Rehabilitation Counselor, to develop alternative job analyses for claimant. Foley testified she had not been satisfied with the work of McLuskie and wanted more jobs identified. Hall was specifically instructed to look for something in the seven to nine dollar range. Hall developed or reviewed job analyses for radio account executive, electronics instructor, and cellular phone technician.

Further Claim's Adjustment

¶71 On May 27, 1999, claimant was again videotaped while outside his residence. He does not use a cane, but his gait appears guarded. In one instance, claimant and his wife are shown pushing a small trailer in their driveway. Linda holds the front of the trailer, and appears to bear much of the weight in pushing. The Court does not find the videotaped activities inconsistent with claimant's presentation of his condition.

¶72 In May or June 1999, claimant and his wife moved to a town near Topeka, Kansas. The move resulted from the transfer of Linda Patrick's job with the VA.

¶73 On June 15, 1999, Edwards met with Dr. Ross to play the videotapes and request approval of Hall's three job analyses. (Ex. 23 at 3.) Dr. Ross made the following recommendations:

1. Radio account executive (ALT) DOT # 259.357-018 - approved.
2. Electronics instructors (ALT) DOT # 097.221-010 - disapproved as written. In the job analysis reviewed, there is a requirement for pushing/pulling, lifting, and carrying of up to 50 pounds. If accommodations could be made to limit lifting to no greater than 25 pounds maximum, this job would be approved.
3. Cellular phone technician (ALT) DOT # 822.281-014 - disapproved as written. The job analysis reviewed indicates lifting and carrying requirements of up to 50 pounds on a rare basis. If accommodations could be made to limit lifting to no greater than 25 pounds, this position would be approved.

(*Id.* at 4.) In his report, Dr. Ross opined that videotaped segments suggested claimant was able to lift, carry, push, and pull items in excess of twenty-five pounds. Nevertheless, he did not change previously prescribed limitations. He stated "[a] reasonable compromise, in my opinion, would be to suggest getting assistance with lifting of any items in excess of 25

pounds." (*Id.*) He noted that "if this accommodation is possible, I would approve both the 'electronics instructor' and 'cellular phone technician jobs.'" (*Id.*)

Reinstatement and Determination of Benefits

¶174 On May 4, 1999, claimant requested the Department of Labor and Industry to order continuation of temporary total disability benefits pursuant to section 39-71-610, MCA. (Ex. 29 at 1.) An order to that effect issued May 17, 1999. (Ex. 30.)

¶175 On June 29, 1999, Foley gave a 14-day notice again switching claimant's benefits from temporary total to permanent partial benefits, writing:

I know [sic] have several jobs approved for Mr. Patrick for position [sic] making more than his time of injury including the overtime rate. I also have a market assessment of the Miles City area and the Topeka Kansas area to verify these jobs exist in both market[s]. You have been provided with a copy of that information. I am also enclosing a copy of the new approved JA's for your file. With this information COLS [sic]⁽⁸⁾ has, again, been met. Please note that the Account Executive for the Radio Station **is with his time of injury employer**. He is employable making more money than his time of injury job paid. He is MMI and not [sic] longer entitled to temporary total disability payments. I am switching his benefits to permanent partial benefits as of 7/12/99 or 14 days from the date of this letter. Please note that since this claim is being litigated all payment will be directed to your office, dual payee and you can forward the payments to your client in Topeka.

Please also note for the record that Dr. Schultz and Dr. Ross both concur that narcotics are inappropriate for Mr. Patrick and that he was taking narcotics for his stomach complications consistently for the past 10 years. Please see the enclosed letter from Dr. Ross. The narcotic use **and abuse** has been well documented in Mr. Patrick's current and past medical history. The narcotics were not prescribed by Dr. Schultz or Dr. Ross and will not be authorized from the date of this letter forward. Any medication prescribed for the back injury will need to be reviewed by Dr. Ross or Dr. Schultz prior to authorization and no narcotic will be authorized now or in the future.

(Ex 28 at 1, underlining in original; bold added.)

¶176 This letter, like others before it, contains significant inaccuracies. There was no account executive position available with claimant's time-of-injury employer, which had gone out of business. There is no documentation of narcotics **abuse** by claimant in the medical records presented.

Testimony of Claimant Regarding Claimant's Condition

¶177 At trial, claimant testified his back pain varies with his activities but is present "every minute of the day." If he "overdoes it," his leg can go out and he falls. His back and abdominal pain may trigger or amplify the other, but the back pain is now more bothersome

than the abdominal pain. His medications, particularly the muscle relaxant, cause drowsiness.

¶178 Claimant believes he cannot perform the jobs identified by the insurer. Based on his work for KYUS, he is familiar with the account executive job and believes he would be required to drive three to five hours per day, which he does not believe he could do. He testified the job description prepared by the insurer did not reflect the reality that an account executive has to do "whatever it takes" to sell ads, which includes being able to work long hours and nights.

¶179 However, claimant does not consider himself totally disabled. His present vocational interests include teaching electronics, but he believes he would need a teaching credential to be hired. He is also interested in repairing electronic equipment, stating he has been studying the latest electronic applications and would like to continue that study.

¶180 Claimant was a credible witness. My determination of credibility is bolstered by claimant's stable personal and employment history. The record indicates claimant has worked steadily despite long-standing serious medical problems. Even following a disability retirement from the VA, he worked his own ranch and obtained employment with KYUS.

Medical Testimony Regarding Claimant's Condition

¶181 Drs. Grierson and Ross testified by deposition. All other medical evidence was presented through the records.

¶182 Dr. Grierson testified based on his personal knowledge of claimant's condition, as well as review of medical records and diagnostic imaging. He opined that claimant's fall at work exacerbated degenerative disk disease, primarily at the L-2, -3 level of the spine, and diagnosed "mechanical low back strain with intermittent radiculopathy, chronic, with acute exacerbations and remissions overlying post[-]traumatic degenerative disk disease." (Grierson Dep. at 12, 21.) He explained that "repeated injury or a single injury of enough severity will increase the degree of degenerative disease on any joint. And I feel that his clinical course would indicate that that's what had happened." (*Id.* at 13.)

¶183 Dr. Grierson pointed to objective findings to support his diagnosis. This included the MRI evidence of degenerative disk disease and post-traumatic changes first noted by Dr. Schultz. (*Id.*) There are also objective indications of the condition present during periods of exacerbation. Dr. Grierson testified that when claimant "has weakness of the muscles of the right leg, when he has peri spinous muscle spasm and straightening of the lumbar spine, those are all objective findings at the time of an acute flare up." (*Id.* at 21.) He found no reason to disbelieve claimant's reports of pain. (*Id.* at 22.)

¶184 Dr. Grierson testified he believes claimant has reached MMI. (*Id.* at 40.) He does not believe additional work hardening programs will help claimant. His experience has been that for someone with claimant's condition such programs "have been detrimental to the patient's recovery." (*Id.* at 46.) Dr. Grierson testified claimant should not perform any vigorous physical activity requiring bending, stooping, kneeling, crawling, or long periods (two to three hours at a time) of sitting or standing. (*Id.* at 23.) He advised against long periods of driving (*id.*) and is concerned about claimant's ability to "hold up to 40 hours a week of any kind of activity, even though there's no requirement to perform activities that are outside of the recommendation." (*Id.* at 27-28.) He noted "sometimes just the day-to-day requirements of minimal physical activity tend to cause flares or acute exacerbation in these patients." (*Id.* at 28.)

¶185 With regard to identified jobs, Dr. Grierson approved the radio announcer and master controller jobs assuming prescribed limitations are followed. (*Id.*) He also approved the radio account executive position as described in the job analysis, provided claimant can take breaks and change positions. (*Id.* at 29.) He opined that the electronics instructor and cellular phone technician jobs would be difficult for claimant to physically perform. (*Id.* at 28.)

¶186 Dr. Ross repeated the conclusions he reached in his reports. Of note was his continued reliance on Dr. McElhinny's "comprehensive psychological review" (Ross Dep. at 43), which he testified was "quite revealing in terms of its findings and recommendations." (*Id.* at 21.) Dr. Ross also testified he did not read Dr. Schultz's reference to "post-traumatic changes" in the MRI as relating to claimant's work injury, however, he could provide no other explanation for Dr. Schultz's note. (*Id.* at 49.)

Claimant's Vocational Expert

¶187 Bob Zadow (Zadow), a certified rehabilitation counselor working in Miles City, testified by deposition. Zadow has provided consulting services in approximately 50 workers' compensation matters, working for both insurers and claimants, and in approximately 300 social security disability cases. (Zadow Dep. at 7-9.) He reviewed the reports of McLuskie and Hall, reviewed the medical reports and interviewed claimant. (*Id.* at 9-10.)

¶188 Zadow questioned claimant's ability to perform the jobs identified by McLuskie and Hall. He testified it might be possible for claimant to be directly placed in a job, but he questioned "how long he [claimant] would be able to sustain that effort to a point where he ran into some restrictions." (*Id.* at 23.) He also questioned the ability or willingness of employers in the identified fields to make long-term accommodations for claimant's limitations. (*Id.*)

¶189 Zadow recommended a vocational plan for claimant taking into account the following:

Mr. Patrick, I feel, does, in fact, have some pretty good vocational background. He has a lot of experience in electronics assembly. Certainly he has retained that knowledge and skills.

My biggest concern about Mr. Patrick, again, are the functional and postural types of limitations. And as we take a look at going back into the competitive labor market, with the requirements again for sustained efforts, given his overall medical condition, not only the one related to his injury but some of the other preexisting conditions, Mr. Patrick may very well have to engage in occupations where he can do things at his own pace.

Specifically what I'm suggesting on that: He does, in fact, have some intact skill areas that probably need to be redefined and refined at this point. And that may involve some educational efforts on a short-term basis, and then possibly some assistance setting up business or consulting services that he could do on his own pace on a contract basis, which would also allow him to design his work space, his production requirements, some ergonomic considerations.

(Zadow Dep. at 22-23.)

¶190 Zadow testified he believes claimant has suffered a wage loss "[a]nd certainly his earning capacity has been restricted and most likely is in need of some redirection." (*Id.*)

Foley's Calculation of Wage Loss

¶191 Foley testified about her method of calculating claimant's wages when computing wage loss. Initially, she used claimant's \$6.00 regular hourly rate and compared it to the average, middle hourly wage on identified jobs. Because the hourly rate on identified jobs exceeded \$6.00, her initial conclusion was that claimant had no wage loss. Later on, she recalculated claimant's hourly wage to take into account his overtime. She divided the total wages (\$10,302.02) by the total hours worked (1,672.5), which yielded an hourly wage of \$6.16. (Ex. 31). She compared this rate to wages in identified jobs, which also showed no wage loss.

Findings Regarding Identified Jobs and Wage Loss

¶192 Based on the evidence presented, I am unpersuaded that any of the jobs identified by the insurer are reasonably available to claimant based upon his current physical restrictions and pain.

¶193 McLuskie identified the position of radio announcer based upon KCTR Radio Station in Billings. That job requires "[t]echnical training radio, TV, understanding of system, computer experience," as well as "[v]oice clarity, hard working to maintain popularity and ratings, ability to market self in community - localize in community commonality with listeners." (Ex. 13 at 11.) The insurer presented no evidence showing that claimant has the skills necessary to perform the job or have a reasonable chance of actual employment. While he has demonstrated skills in electronics and TV station operation, there is no evidence that

his skills are transferrable to what is essentially a public performance position. Zadow noted that claimant had not worked as a radio announcer, would likely need training for that job, and may not have the stamina necessary for the position. (Zadow Dep. at 16.)

¶194 The master control operator job (also referred to as "television switcher") was researched by McLuskie through KTVH Television in Helena. (Ex. 13 at 13.) This position was only conditionally approved by Dr. Ross and Dr. Grierson. There is no evidence that modified jobs exist. Zadow testified that he was concerned this job would usually involve duties "which may be some barriers because of some postural implications." (Zadow Dep. at 16.)

¶195 The final job identified in McLuskie's report was electronics technician. (Ex. 13 at 23.) He did not submit this position for approval by Dr. Ross (*id.* at 6), nor was the position further explored by the insurer, perhaps because of retraining implications.

¶196 Of the jobs identified by Hall, the radio account executive position represents work similar to some of the work claimant did for KYUS. I found credible and persuasive claimant's testimony that he is unable to perform this work because of travel, overtime, and "hustling" requirements. Zadow's and Hall's testimony corroborated claimant's assessment. Zadow noted "part of the problem [is] that the income potential really involves several variables in terms that may be linked to the person's ability to engage in sustained efforts." (Zadow Dep. at 17.) Hall testified that the position would require claimant to drive much of the day and that it would require hustling, which is more difficult with back pain. He agreed that back pain, as well as frequent breaks due to pain, could impede performance and diminish income.

¶197 The second position identified by Hall, cellular phone technician, was based upon interviews at Cellular One in Miles City. Hall opined claimant could obtain and perform this job, but his own report raises questions concerning his opinion. The report quotes the Cellular One representative as stating the position of cellular phone technician was "being utilized to a lesser extent," with technicians generally performing installations and adjustments rather than working on repair of phones. (Ex. 10 at 2.) Hall also referenced information from another cellular store in Miles City that the job primarily involved phone installation. (*Id.*) At trial, Hall acknowledged he did not know how much time cellular phone technicians spend installing phones or how much bending and twisting was required to complete installations. Hall's research into the requirements of the position was inadequate. Moreover, Zadow testified that cellular phone technician was "another area that is fairly production intensive in terms of having work quotas and the requirement to engage in work on a sustained basis." (Zadow Dep. at 20.) He stated the job required installing phones in vehicles, meaning the worker must assume various positions and postures to access areas under dashboards and in trunks. (*Id.*) The evidence fails to persuade me that claimant can perform the job.

¶198 The final job identified by the insurer was electronics instructor. At trial, I ruled this job was neither reasonable nor available. Hall's testimony indicated that only one such position existed at the Miles City Community College with little, if any, prospect that claimant might secure employment. While another position existed at a local high school, a teaching certificate was required; claimant does not have a certificate. In addition, Zadow testified there are lifting requirements in the job which would have to be accommodated. More importantly, Zadow testified that the last six people hired for the position at Miles City Community College had at least a baccalaureate degree, which claimant does not have, and that the position was very competitive, with many applicants having master's as well as bachelor's degrees. (*Id.* at 19-20.) No evidence of positions in other localities was presented.

¶199 Hall testified he gathered some data regarding labor markets in Topeka, Kansas. His report attaches computerized lists of positions, including work in electronics and involving cellular phones, but provides no information regarding requirements for such work or claimant's ability to obtain or perform the work in the Topeka area. The research is insufficient to show claimant is presently employable in that area.

¶100 As shown by the foregoing discussion, rehabilitation efforts and evaluation have to date been inadequate. The insurer has failed to establish that claimant has a reasonable prospect of employment without retraining or other vocational assistance. Claimant, on the other hand, has established that his physical limitations severely limit his ability to work and that he requires additional vocational assistance in identifying jobs within his capabilities and securing work. Presently, claimant has a total wage loss.

Unreasonable Conduct

¶101 I find that the insurer has acted unreasonably in delaying and refusing rehabilitation benefits. Its handling of this case has been colored from the onset by its claims adjuster's view that claimant should have returned to his time-of-injury job within a matter of six to eight weeks. Foley employed a private investigator based only on a computer-generated "fraud flag," which in turn was based only on claimant's failure to return to work within an expected or predicted period of time. There was no other suggestion for the step. Foley failed to consider the fact that claimant's back injury came on top of a serious, preexisting abdominal condition.

¶102 Of great concern to the Court is the adversarial stance taken by the insurer from the point of time the so called "fraud flag" was triggered. From then on the insurer appears to have focused its adjusting efforts on preparing a case for termination of benefits without further liability. This is indicated by the early order of surveillance and Foley's apparent communication to the investigator, without any support whatsoever, that there was no objective evidence of injury and the treating physician was "making matters worse." (Ex 27 at 9.) Edward's "anticipated outcome" of an IME (¶ 37) prejudices the outcome of the IME

and smacks of aggressive case management aimed solely at getting claimant off benefits. The referral for the neuropsychological evaluation without any medical or factual indication for such evaluation indicates the insurer was looking for information to justify cutting off benefits. Why the neuropsychologist report was provided to Dr. Ross but the report of an orthopedic surgeon who "found no evidence of abnormal illness behavior or secondary gain in this patient" (ex. 14 at 5) was not provided, is unexplained.

¶103 Similarly, the record demonstrates McLuskie and Hall were hired simply to gather evidence to prove claimant had no wage loss, not to evaluate claimant's vocational potential in light of his actual situation.

¶104 As the statutes and prior decisions of this Court show, an insurer certainly need not accept a claimant's demands for rehabilitation in all circumstances (§ 39-71-1006; *Eastman v. Ins. Co. of America*, 1999 MTWCC 46). However, refusal of benefits must be reasonable under the particular circumstances of each case. In this case, I find that the insurer did not make an honest, good faith effort to determine claimant's vocational needs. Therefore, it's denial of rehabilitation benefits was unreasonable.

CONCLUSIONS OF LAW

I.

¶105 Claimant's injury is governed by the 1997 version of the Workers' Compensation Act. *Buckman v. Montana Deaconess Hosp.*, 224 Mont. 319, 321, 730 P.2d 380, 382 (1986).

II.

¶106 Claimant's request for rehabilitation benefits is governed by section 39-71-1006, MCA (1997), which provides:

39-71-1006. Rehabilitation benefits. (1) A worker is eligible for rehabilitation benefits if:

(a)(i) the worker meets the definition of a disabled worker as provided in 39-71-1011; or

(ii) the worker has, as a result of the work-related injury, a whole person impairment rating of 15% or greater, as established by objective medical findings, and has no actual wage loss;

(b) a rehabilitation provider, as designated by the insurer, certifies that the worker has reasonable vocational goals and reasonable reemployment opportunity. If eligible because of an impairment rating of 15% or more, with rehabilitation the worker will have a reasonable increase in the worker's wage compared to the wage that the worker received at the time of injury. If eligible because of a wage loss, the worker will have a reasonable reduction in the worker's actual wage loss with rehabilitation.

(c) a rehabilitation plan is agreed upon by the worker and the insurer and a written copy of the plan is provided to the worker. The plan must take into consideration the worker's age, education, training, work history, residual physical capacities, and vocational interests. The plan must specify a beginning date and a completion date. The plan must specify the cost of tuition, fees, books, and other reasonable and necessary retraining expenses required to complete the plan.

(2) A disabled worker is entitled to receive biweekly compensation benefits at the worker's temporary total disability rate. The benefits must be paid for the period specified in the rehabilitation plan, not to exceed 104 weeks. The rehabilitation plan must be completed within 26 weeks of the completion date specified in the plan. Rehabilitation benefits must be paid biweekly while the worker is satisfactorily progressing in the agreed-upon rehabilitation plan. Benefits under this section are not subject to the lump-sum provisions of 39-71-741.

(3) In addition to rehabilitation benefits payable under subsection (2), a disabled worker who was injured on or after July 1, 1997, is entitled to receive payment for tuition, fees, books, and other reasonable and necessary retraining expenses, excluding travel and living expenses paid pursuant to the provisions of 39-71-1025, as set forth in department rules and as specified in the rehabilitation plan. Expenses must be paid directly by the insurer.

(4) A worker may not receive temporary total benefits and the benefits under subsection (2) during the same period of time.

(5) A rehabilitation provider authorized by the insurer shall continue to assist the injured worker until the rehabilitation plan is completed.

(6) To be eligible for benefits under this section, a worker is required to begin the rehabilitation plan within 78 weeks of reaching maximum medical healing.

(7) A worker may not receive both wages and rehabilitation benefits without the written consent of the insurer. A worker who receives both wages and rehabilitation benefits without written consent of the insurer is guilty of theft and may be prosecuted under 45-6-301.

As set forth in subsection 1(a), claimant is eligible for rehabilitation benefits only if he meets the definition of disabled worker in section 39-71-1011, MCA, which provides:

(2) "Disabled worker" means a worker who has a permanent impairment, established by objective medical findings, resulting from a work-related injury that precludes the worker from returning to the job the worker held at the time of the injury or to a job with similar physical requirements and who has an actual wage loss as a result of the injury.

Because claimant has both a permanent impairment and an actual wage loss, he has satisfied the preliminary requirements of sections 39-71-1006, MCA, and 39-71-1011(2), MCA.

¶107 The State Fund was therefore required to designate a rehabilitation provider to develop a rehabilitation plan. § 39-71-1006(1)(b), MCA (1997). The section provides the rehabilitation provider with discretion in formulating a plan, however, the discretion is confined by the considerations set forth in the section. First, and foremost, the plan must attempt to achieve "a reasonable reduction in the worker's actual wage loss."

¶108 In *Leastman v. Liberty Mutual Fire Ins. Co.*, 1999 MTWCC 2, decided January 6, 1999, I noted as follows:

While returning an injured worker to work is one of the general objectives of the Workers' Compensation Act, § 39-71-105(2), MCA (1995), it is not the sole objective, otherwise rehabilitation benefits would be available only to workers who are permanently **totally** disabled. Permanent partially disabled workers by definition can return to work in some capacity, even if only at a minimum wage. § 39-71-116(22), MCA (1995). Section 39-71-1006, MCA, requires only some wage loss, not a total wage loss. It acknowledges a reduction in wage loss as one of the goals in rehabilitation. By requiring a continuation of total disability benefits during a period of retraining and reeducation, § 39-71-1006(2), MCA, it acknowledges that a rehabilitation plan may postpone employment.

The section also requires consideration of the individual worker, taking into account the "worker's age, education, training, work history, residual physical capacities and vocational interest." § 39-71-1006(1)(c), MCA. The section is intended as more than a theoretical exercise. It requires more than tabulating high, low and average wages for positions for which the worker might theoretically be qualified. Rather, it requires careful assessment of the worker's realistic and reasonable prospects for obtaining employment and a further assessment of the realistic wages he or she is likely to earn. That assessment must compare realistic job prospects and wages without further education or retraining with realistic job prospects and wages if the worker participates in retraining and/or further education which is consistent with his or her "age, education, training, work history, residual physical capacities and vocational interest." If there is a reasonable prospect that training or further education will result in significantly higher wages than without such training or education, then the plan must provide for the training or education.

Leastman at 19-20.

¶109 In this case, the State Fund essentially limited the rehabilitation evaluation to the gathering of information to support the insurer's conclusion claimant suffered no wage loss. The evaluations were woefully inadequate, and fell far short of conducting the "careful assessment of the worker's realistic and reasonable prospects for obtaining employment"

or the "further assessment of the realistic wages he or she is likely to earn." *Leastman, supra*, ¶ 66.

¶1110 Unlike the situation in *Leastman*, claimant in this case has not presented a rehabilitation plan for the review of the insurer or the Court. Nevertheless, he is entitled to an order of this Court that the insurer provide rehabilitation services consistent with this opinion. Because none of the "direct placement" options identified by the insurer are viable options for claimant, the insurer is ordered to designate a rehabilitation provider for the purpose of developing a plan for retraining or self-employment.

¶1111 The insurer failed to fulfill its statutory obligations under the rehabilitation provisions, and has caused the delay in creating and implementing a rehabilitation plan. It cannot take advantage of its own wrong. Accordingly, claimant is entitled to retroactive temporary total disability benefits for all periods in which he did not receive those benefits. Such benefits shall continue until a rehabilitation plan is formulated and claimant begins receiving rehabilitation benefits.

II.

¶1112 Since the Court has concluded that claimant is entitled to rehabilitation benefits, it does not reach the claimant's alternative request for permanent partial disability benefits.

III.

¶1113 Since State Fund has unreasonably denied rehabilitation benefits, claimant is entitled to his attorney's fees, costs, and a penalty. § 39-71-612, 2907.

JUDGMENT

¶1114 1. Pursuant to section 39-71-1006(2), MCA (1997), State Fund shall provide rehabilitation services to claimant consistent with this opinion.

¶1115 2. Claimant is entitled to, and the State Fund shall pay, retroactive temporary total disability benefits for all periods in which claimant did not receive such benefits. Further the State Fund shall from this date forward continue to pay claimant temporary total disability benefits until a rehabilitation plan is put into place and rehabilitation benefits begin.

¶1116 3. Petitioner is entitled to attorney fees and costs in an amount to be determined by the Court.

¶1117 4. State Fund shall pay claimant a penalty of 20% with respect to all rehabilitation benefits and with respect to all temporary total disability benefits which are payable as a result of this judgment.

¶118 5. This JUDGMENT is certified as final for purposes of appeal pursuant to ARM 24.5.348.

¶119 6. 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 4th day of April, 2000.

(SEAL)

\s\ Mike McCarter
JUDGE

c: Mr. Marvin L. Howe

Mr. Greg Overturf

Date Submitted: October 19, 1999

1. Although medical case management services began during February, McLuskie's initial interview with claimant did not take place until July 20, 1998. (*Id.* at 22, 74.)

2. Foley testified Dr. Schultz was a managed care physician whom claimant had picked from a list.

3. Claimant went to KYUS that day at the request of Dennis McLuskie, who was preparing a job analysis regarding claimant's time-of-injury work. (Ex. 13 at 73.)

4. Presumably, the reference was to Dr. Stickney.

5. While Edwards wrote to "Dr. Joseph McElhinny, M.D." to schedule the appointment, Dr. McElhinny is not a medical doctor, but holds a Psy.D. degree, which is a degree in psychology based upon clinical training as opposed to training in research. See Monitor on Psychology, Vol. 31, No. 1, January 2000, explaining Psy.D. degree, at <http://www.apa.org/monitor/jan00/ed.1.html>.

6. Dr. McElhinny cautioned other health care providers against prescribing narcotic pain medication because claimant "has a history of substance abuse which places him at a higher risk than average for prescription drug dependence." (Ex. 15 at 7.) His warning has little basis. The reference to "substance abuse" was based upon claimant's acknowledgment that he drank heavily for approximately six years after returning from Vietnam. But Dr. McElhinny's report also reflects that claimant's excessive drinking ended approximately twenty years ago. Moreover, the narcotic drugs claimant has been taking were prescribed and monitored by claimant's treating physician for severe pain resulting from his abdominal disease and surgeries.

7. Dr. McElhinny's report reflects his knowledge that claimant was examined by Dr. Rizzolo on June 30, 1998, and notes he did not have a copy of Dr. Rizzolo's report. (Ex. 15 at 5.)

8. Presumably a reference to *Coles v. Seven Eleven Stores*, 217 Mont. 343, 704 P.2d 1048 (1985), which engrafted upon section 39-71-609, MCA, certain requirements for terminating temporary total disability benefits, *Wood v. Consolidated Freightways, Inc.*, 248 Mont. 26, 30, 808 P.2d 502, 505 (1991).