IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

2000 MT WCC 5

WCC No. 9901-8155

CHARLES ROLLINS

Petitioner

vs.

LIBERTY NORTHWEST INSURANCE,

Respondent/Insurer for

BRUCE WALTER TRUCK SERVICES, INCORPORATED,

Employer.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND JUDGMENT

Summary: 47-year-old claimant, who injured his leg in work as truck driver, and had entered a Compromise and Release Settlement with the insurer, sought to re-open the settlement on the argument he was permanently and totally disabled and the parties had been mutually mistaken about his ability to work at the time of settlement.

Held: Claimant is not PPD. Videotapes depicting claimant engaged in various activities around his house, and before and after IME and deposition, contradicted his claims of disability, his specific testimony about particular activities, and expert opinions based on his representations of disability. WCC found that while claimant does experience some degree of leg pain, he has exaggerated and misrepresented his pain and disability to physicians, vocational consultants, and the Court.

Topics:

Settlements: Reopening: Mistake of Fact. Where claimant argued parties had been mistaken prior to settlement on his ability to work, and claimed he had been and continued to be permanently totally disabled, claim to reopen rejected where claimant did not convince the Court he was PTD.

Witnesses: Credibility. Videotapes depicting claimant engaged in various activities around his house, and before and after IME and deposition, contradicted his claims

of disability, his specific testimony about particular activities, and expert opinions based on his representations of disability.

Witnesses: Exaggeration. In denying PTD benefits, WCC found that while claimant does experience some degree of leg pain, he has exaggerated and misrepresented his pain and disability to physicians, vocational consultants, and the Court. Videotape depicting activities around his home, and before and after IME and deposition, significant in contradicting claims of disability.

¶1 The trial in this matter was held on October 14 and 15, 1999, in Great Falls, Montana. Petitioner, Charles Rollins (claimant), was represented by Mr. Randall O. Skorheim. Respondent, Liberty Northwest Insurance (Liberty), was represented by Mr. Larry W. Jones. A complete trial transcript has not been prepared.

¶2 Exhibits: Exhibits 1 through 28, 30 through 34, and 36 through 39 were admitted without objection. Exhibit 29 was admitted in part without objection (Tapes A, B, D-G). Tape C of Exhibit 29 (a videotape of an interview of Ruby Rollins) and Exhibit 35 (a written statement of Ruby Rollins) were not admitted.

¶3 Witnesses and Depositions: The claimant Charles Rollins, Dr. Ronald M. Peterson, David C. Segerstrom, Winton Rollins, Ruby Rollins, JoAnn Null, Sheila Riesenberg, Bruce Carmichael, and Sandy Scholl were sworn and testified at trial. The depositions of Charles Rollins (2), Dr. Dana M. Headapohl, Meredith Hudson (2), JoAnn Null, Dr. Ronald M. Peterson, David C. Segerstrom, and Dr. Jon H. Walz, Jr., were admitted for the Court's consideration.

¶4 Pretrial Ruling on Motion in Limine: Respondent sought to introduce opinion testimony from two physicians concerning whether claimant was "malingering." Claimant moved to exclude this testimony. Prior to trial, the Court ruled that the proposed testimony would be excluded absent evidence of the witnesses' special training or expertise in detecting malingering. See, Linden v. Huestis, 247 Mont. 383, 388, 807 P.2d 185, 188 (1991) (noting that doctors not trained in detecting malingering are no more qualified than the trier of fact to determine a litigant's motivation for making a claim). However, the Court ruled that medical testimony regarding inconsistencies between the claimant's reported symptoms and objective medical findings was admissible. With regard to deposition testimony of Dr. Peterson concerning malingering, which claimant failed to object to, the Court gives it no weight. (See partial transcript of proceedings at 5-7.)

¶5 Issues presented: The issues as restated by the Court are as follows:

1. Whether the Full and Final Compromise Settlement should be reopened based upon a mutual mistake of fact.

2. Whether claimant is permanently totally disabled.

¶6 During trial, the parties stipulated that a third issue set out in the pretrial order concerning a penalty, attorneys fees, and costs, is withdrawn.

¶7 Having considered the pretrial order, the testimony presented at trial, the demeanor and credibility of the witnesses, the depositions and exhibits, and the arguments of the parties, the Court makes the following:

FINDINGS OF FACT

¶8 Claimant is presently forty-seven years old. He has a high school education.

¶9 On June 1, 1995, claimant was working as a truck driver for Bruce Walter Truck Services, Incorporated. On that date, while in the course and scope of his employment, he felt "something rip" inside his leg as he was cranking up a tractor trailer.

¶10 Claimant continued working through September 1995, when he was hospitalized and diagnosed with "pain, swelling, and erythema in his right lower extremity which was felt secondary to a deep venous thrombosis (DVT) most likely related to his sedentary work involving sitting for prolonged periods of time driving trucks." (Ex. 2 at 6.)

¶11 Liberty accepted liability for the injury and paid medical and compensation benefits.

¶12 Claimant returned to truck driving in October, but his leg swelled and he was taken off work. During November or December 1995, he again drove but continued to experience leg pain and was again taken off work. Except for a brief stint detailing cars, he has not been employed since then.

Settlement

¶13 In January 1997, claimant and Sandy Scholl (Scholl), a claims adjuster for Liberty discussed settlement. They reached an agreement and by letter dated January 29, 1997, Scholl forwarded claimant a Petition For Compromise And Release Settlement, along with a settlement recap sheet. (Ex 32; Rollins Dep. I Ex. 10.) On approximately February 4, 1997, claimant called Scholl with questions, which she answered. Claimant then signed the petition and returned it to Ms. Scholl around February 7, 1997.

¶14 The settlement was approved by the Department of Labor and Industry by order dated February 18, 1997. (Ex. 33.) Medical and hospital benefits were reserved to claimant; other benefits were settled for $39,165. (Id.)

¶15 The Settlement Recap Sheet shows that the claim was settled on a permanent partial disability basis. It sets forth the following percentages for the factors enumerated in section 39-71-703, MCA (1993), as follows:

Impairment	16%
Age	2%

Education	2%
Restrictions	20%
Wage loss	20%
TOTAL	60%

(Ex. 33.) Under section 39-71-703, MCA (1993), 60% of 350 weeks equals 210 weeks. As set forth in the settlement recap memo, the 210 weeks was multiplied by the claimant's weekly permanent partial disability rate of $186.50 to arrive at $39,165.00, which is the amount of the settlement.

¶16 Claimant now seeks to reopen the 1997 settlement, alleging mutual mistake of fact as to his ability to work. He claims that he is permanently totally disabled and that the parties were unaware of such fact at the time of the settlement.

Pre-Settlement Medical History

¶17 Since his industrial injury, claimant has been treated for his DVT and complications by numerous health care providers.

¶18 During the fall of 1995, claimant was treated by Dr. Steven M. Chrzanowski, an internist. Dr. Chrzanowski prescribed Coumadin, an anticoagulant, and Jobst stockings to control swelling. (Ex. 5 at 40-42.) Because of claimant's continuing complaints of pain in his leg, in March 1996, Dr. Chrzanowski prescribed physical therapy. (Id. at 25, 27.) The Court notes that the medical records are replete with physicians' recommendations that claimant continue to wear the Jobst stockings and their observations that claimant failed to follow the recommendation.

¶19 On March 27, 1996, claimant was hospitalized for a myocardial infarction. His physicians determined he suffered a blockage and thrombosis in his coronary artery circulation and he underwent angioplasty and a stent placement. (Ex. 5 at 24-27; Ex. 7 at 2.) His heart problems are unrelated to his industrial injury.

¶20 On May 14, 1996, Dr. Chrzanowski recorded claimant was "still having cramping sensation in his right leg, pain when he stands for more than a few minutes." (Ex. 5 at 10.) Dr. Chrzanowski did "not see him going back to work at this time." He referred claimant back to physical therapy and noted claimant was "considering some re-training activities." (Id.)

¶21 On June 17, 1996, Dr. Chrzanowski reported that claimant was continuing physical therapy and taking his medications, but was continuing to report discomfort with his right leg. Dr. Chrzanowski diagnosed "[p]ost-phlebitic syndrome" and concluded it was unlikely claimant could return to work as a truck driver. (Id. at 7.)

¶22 On June 27, 1996, Dr. Chrzanowski reported that claimant was "feeling depressed about all of his medical problems and his recovery" and prescribed anti-depressant medication. (Id. at 4.)

¶23 Claimant was then referred to Dr. Ronald Peterson, a specialist in occupational and sports medicine, for management of continuing leg pain. Dr. Peterson examined claimant on July 26, 1996, and noted an injury "consistent with muscle strain or tear within the right lower extremity, with subsequent development of deep vein thrombosis, now with post phlebitic syndrome (729.5) of the right leg." (Ex. 3 at 42.) Dr. Peterson also noted an adjustment disorder with mixed emotional features. He suggested a change in medications, physical therapy, and a psychological evaluation by Dr. Patrick Davis, a clinical psychologist, for pain management and general mental status. (Id. 3 at 39-42.)

¶24 Dr. Davis examined claimant in August 1996. He diagnosed an "[a]djustment [d]isorder with mixed disturbance of emotions and conduct" and began treating claimant. (Ex. 8 at 44.)

¶25 Dr. Peterson continued treating claimant. He reported little or no improvement in claimant's reports of pain. On August 22, 1996, Dr. Peterson wrote that he was incapable of returning to truck driving "because of the prolonged sitting required, as well as the requirements of loading and unloading." (Ex. 3 at 36.) He recommended vocational rehabilitation and rated claimant's impairment at 40% of the lower extremity and 16% of the whole person. (Id.)

¶26 On September 5, 1996, Dr. Peterson gave claimant a "prescription . . . for temporary use of wheelchair to aid in excursions as needed." (Id. at 32.) Dr. Peterson testified he prescribed the wheelchair at claimant's request. He also testified, and noted in his records, that he saw no medical reason for claimant to use a wheelchair on an ongoing basis and told claimant the wheelchair was for short-term use. (Id; Peterson Dep. at 4.)

¶27 Dr. Peterson testified that during September 1996, he "was having difficulty finding consistent objective findings on the physical exam that would support Mr. Rollins' subjective complaints of pain" so he began what became "multiple discussions with both Mr. and Mrs. Rollins" about the need to use narcotics on a short-term basis only. (Peterson Dep. at 5-6.)

¶28 On October 26, 1996, Dr. Peterson reviewed several job analyses prepared by a vocational consultant hired by the insurer and released claimant to return to part-time work, beginning at "four hours per day, 20 hours per week, with the expectation that he would be able to progress to full-time over two to six weeks, depending on his endurance." (Ex. 3 at 26.) The jobs approved by Dr. Peterson included furniture salesperson, telemarketer, and hotel/motel desk clerk. (Ex. 28 at 68, 79.) Dr. Peterson disapproved

school bus driver, service writer, truck driver, and general sales clerk. (Id. 28 at 36, 42, 48, 51, 68.)

¶29 On November 14, 1996, claimant reported slow improvement and continued pain in his right leg while standing or walking. Dr. Peterson's examination revealed little physical difference between claimant's right and left lower extremities. (Ex. 3 at 22.) He suggested a second opinion to rule out "sympathetically mediated pain." (Id. at 23.)

¶30 Claimant was then examined by Patrick E. Galvas, D.O., Ph.D., who found no indication of "reflex sympathetic dystrophy" but recommended changes in medication and psychological counseling. (Ex. 9 at 2.)

¶31 During examinations in December 1996, claimant continued to report pain in his right leg which he said increased with activity. (Ex. 3 at 17-19.) Dr. Peterson continued to hold "long discussion[s]" with claimant and his wife regarding narcotic use and pain management. On December 30, 1996, Dr. Peterson reported, "Mr. Rollins shows minimal interest in this discussion, and is quite concerned that he will continue to need ongoing narcotic medication at present levels." (Id. at 17.) Dr. Peterson also observed claimant had not seen a physical therapist for several months and "encouraged him to meet with a therapist once per month for review/updates of his home program, to which he agrees." (Id.)

¶32 On December 6, 1996, Dr. Peterson prescribed a cane at claimant's request. Dr. Peterson told claimant the cane should be used "as little as possible, mainly for stability with icy conditions." (Id. at 20; Peterson Dep. at 5.)

¶33 After examination on January 13, 1997, Dr. Peterson reported claimant was "equivocal in terms of whether he feels he has improved." (Ex. 3 at 15.) He had another "long discussion regarding current narcotic medication usage." (Id., emphasis in original.)
Presettlement Psychological Evaluation and Treatment

¶34 When claimant was examined by Dr. Davis in August 1996, he complained of severe pain and difficulty adjusting his lifestyle to accommodate his pain. Among other things, Dr. Davis noted claimant "has been prescribed Jobst Stockings to help with the circulation in his legs, however he does not wear them with as much frequency as might be desired because he finds them to be quite uncomfortable." (Ex. 8 at 41.) Dr. Davis also noted: "It is quite clear from talking with Mr. Rollins that he is not the type of fellow who easily follows medical recommendations or instructions if they do not fit with his own preconceived notion of what would be in his best interests." (Id.) Dr. Davis further recorded that "[a]t the present time Mr. Rollins' occupational plan is either to return to trucking or to participate in some form of retraining for something that will pay him as well as his trucking work did." (Id. at 43.) Finally, he noted that claimant reported mostly sleeping and watching television, without any motivation or plans for the future. (Id.)

¶35 Dr. Davis prescribed psychotherapy with the goal of emotional and behavioral adjustment and reduction in symptoms of depression. (Id. at 44.) Between August 1996 and February 1997, claimant attended individual and group psychotherapy sessions, sometimes with his wife. Dr. Davis's records reference claimant's lack of planning for return to work. On August 27, 1996, Dr. Davis recorded that claimant told him that he had "the 'wind' knocked out of him" when recently told he would soon be declared at maximum medical improvement (MMI) and noted that claimant needed to "become actively involved in planning his vocational future now that he is at MMI." (Id. at 40.) On September 20, 1996, Dr. Davis noted:

> I think that Mr. Rollins would agree that return to work is a primary goal in his case, however, I think that it will be difficult for him to muster the motivation, or to demonstrate the problem solving skills, to make this happen without plenty of support from all members of his treatment team. As such, I would encourage active involvement on the part of the Vocational Rehabilitation professionals as soon as possible in his case.

(Id. at 37.)

¶36 On December 5, 1996, Dr. Davis recorded that claimant was perplexed "over the mixture of opinions he has been getting with regard to his ability to return to work." (Id. at 22.) Claimant told the doctor "that while he has received the opinion from a couple of professionals that he is not able to return to work at the present time, he also has been receiving the information from his vocational rehabilitation counselor at Crawford that he should be out looking for work 40 hours per week." (Id.) Dr. Davis advised claimant "to not be belligerent, to try and remain optimistic, and to be self directed with regard to his future vocational goals." (Id.)

¶37 On December 20, 1996, Dr. Davis noted:

> Mr. Rollins reports that he is feeling "kind of down" today. He describes continued difficulty with accepting the chronicity of his physical condition and his need to find an alternative occupation. He gives voice to continued complaints about his interactions with the Vocational Rehabilitation Personnel he is working with. He admits that he has a tendency to go "overboard" when he gets mad and that he may be inadvertently undermining the efforts of his vocational rehabilitation workers. He does continue to appear to be very focused on obstacles to achieving a return to work. He notes that in the interim between group contacts he made the decision to give up his commercial driver's license and that he is currently feeling quite demoralized about this event.

(Id. at 17.)

¶38 On January 28, 1997, Dr. Davis noted: "Mr. Rollins has been active in filling out applications and applying for various jobs around town. He is quite discouraged about his progress in this regard however." (Id. at 9.) That same date, claimant and Dr. Davis worked with some of claimant's "negative thoughts," including: "Any job that he may get will be meaningless. Any job that he may get will pay poorly. He will not be able to emotionally cope with not being able to be on the road anymore. Why me? Being a dispatcher would be too emotionally upsetting." (Id.) Dr. Davis further noted:

> We also spend [sic] some time today discussing his perception that he made a mistake by turning down the opportunity for retraining when it was offered to him. He now realizes that his spelling skills are so poor that they represent a significant obstacle to obtaining many of the jobs he would be interested in doing.

(Id. at 10.)

¶39 In records dated February 4, 1997, Dr. Davis noted claimant appeared "demoralized" and was "presently preoccupied with attempting to determine how to best utilize the financial resources now available to him since his Workman's Compensation case is being settled." (Ex. 8 at 6.) The primary problem discussed by claimant "is that no matter how he figures it there is not enough money to go around. As such, none of the available options are very appealing." (Id.)

¶40 According to Dr. Davis's records, claimant's last session was February 19, 1997, several days after settlement. Dr. Davis noted claimant's anger "about the way he perceives himself to have been unfairly treated both by his physician and by his insurance company." (Id. at 2.)

Vocational Evidence

¶41 Prior to the 1997 settlement, Liberty employed Bruce Carmichael (Carmichael), a certified vocational counselor with 25 years of experience (ex. 38) who was at the time working for Crawford and Company, to perform a vocational assessment of claimant. Carmichael, who is no longer employed by Crawford, testified at trial and I found his testimony credible and persuasive.

¶42 Claimant's employment experience includes over-the-road truck driving, work in his family's furniture business, sales and delivery of food for Schwan's, miscellaneous odd jobs, and, from 1986 through 1990, employment with Aladdin's entertainment business, where he worked his way up to manager of a store located in Concord, California. At the time of his injury, claimant had been working as an over-the-road truck driver since 1990.

¶43 Based on claimant's skills, as demonstrated by his prior employment, and his physical limitations, Carmichael identified several potential jobs for claimant, including telemarketing, furniture sales, and hotel/motel desk clerk. Carmichael testified

persuasively that the best indicator of an individual's skills are his or her successful work experience, which in claimant's case included both work in his family's furniture business and management of a small entertainment business. Carmichael testified that those jobs are still appropriate for claimant.

¶44 Some of the jobs identified by Carmichael involve typing or data entry, however, Carmichael testified that the sort of skills required were typically learned on the job or through short keyboarding courses typically available in Great Falls. Moreover, the claimant owns a computer. While he emphasized that the computer is antiquated and his skills limited, the Court did not find claimant to be a credible witness and had the distinct impression, and infers, that claimant understated his computer skills.

¶45 A plan for reemployment was developed by Micki Marion (Marion), the vocational consultant who succeeded Carmichael. The plan was signed by claimant on November 14, 1996, and called for claimant to seek employment as a furniture salesman, telemarketer, and motel/hotel desk clerk. (Ex. 30 at 28.)

¶46 Beginning in November 1996, Crawford provided job placement services to claimant though Sheila Riesenberg (Riesenberg), an employment consultant with Crawford. Riesenberg provided claimant with job leads, including leads for actual job openings. She testified that claimant's efforts to seek employment were minimal. Marion, who oversaw Riesenberg's work with claimant, concurred with that characterization. (Ex. 30 at 7.)

¶47 Telemarketer, furniture sales, and hotel/motel desk clerk jobs are available in the Great Falls area and there are routinely openings for those positions, especially for telemarketer and similar phone-type jobs.

¶48 In the weeks prior to settlement, claimant also received vocational assistance from JoAnn Null (Null), a certified rehabilitation counselor for the State. Null first met with claimant on December 4, 1996. Her records indicate claimant said he was referred by Dr. Peterson, "who informed him that he would be unable to return to his previous job." (Ex. 27 at 218.)

¶49 Null referred claimant to Meredith Hudson (Hudson) of Career Development Associates for testing. (Ex. 26.) Hudson, who is also a certified vocational counselor, concluded that claimant's "abilities and skills are generally in the average range, with performance skills seeming higher than verbal skills." (Id. at 2.) She considered him a "'hands-on' learner who would profit more from on-the-job training or vocational-technical training than he would from a college educational program." (Id.) She also reported claimant "expressed interest in working with computers" and concluded "he should be able to learn the basics," though actual computer courses might require tutoring. (Id.)

¶50 However, based upon "his [claimant's] levels of pain and fatigue during evaluation," Hudson was concerned about claimant's ability to study or work "more than two-to-four hours per day." (Id.) She noted claimant came to the evaluation using his cane and "brought his wheelchair to sit in throughout the day." (Id. at 4.)

¶51 Null concluded that claimant was unable to work full time and testified that in a January 31, 1997 meeting with claimant, she and Hudson told him he could not work full time. She believes that she informed him, as recorded in her report, that he should "[p]ursue his claim for SSDI benefits as it seems unlikely that he can go right out and be employed in a sedentary occupation until he has some specific training." (Id. at 3.) Null further testified that claimant did not accept their opinions at that time and said that he thought he could work full time. (Null Dep. at 12.)

¶52 In a February 5, 1997 report prepared for the Social Security Administration (Null Dep. at 7-8), Null concluded claimant "is not capable of working," noting, "I have worked with many individuals who are on Social Security who are not as severe as Charles is presently." (Rollins Dep. I, Ex. 8 at 2.) In support of her conclusion, Null noted that claimant "gets around with the assistance of a cane and often uses a wheelchair. He cannot walk without assistance." (Id.; Null Dep. at 12-13.) At deposition, Null further explained her understanding of claimant's ability to walk: "he would either bounce off the walls, or his wife would be, his wife at the time would be with him, or he would grab my arm going down the hall." (Id. at 13.) Null's records also reflect that claimant told her, during their initial meeting, that he needed a cane, although he did not have a cane that day. (Ex. 27 at 218.)

¶53 At trial, Null testified she did not believe claimant could successfully perform the jobs identified by Crawford. She believed the telemarketer position required too much sitting and noted claimant was not, in her opinion, "computer literate," which she thought was necessary for the job. (Trial Test.) She believed jobs of debt collector and customer service representative were too stressful for claimant, noting his tendency toward anger. With regard to the answering service operator position, she believed claimant was not capable of entering messages in a computer or handling the stress of incoming calls. She acknowledged, however, that claimant had not been given any tests indicating he could not perform that work. She ruled out furniture sales due to problems claimant would have greeting people, being on his feet, and using a computer. Null believed claimant could not work as a motel/hotel desk clerk due to difficulties he would have with computer usage, filing, spelling, and handling credit cards.

¶54 However, Null acknowledged that claimant, as a truck driver, would likely have developed skills involving log keeping, paperwork, handling of invoices or bills of lading, and communicating with others. She testified her opinion about claimant's inability to use a computer was based upon what he said, not upon any testing. Similarly, her opinion about his inability to deal with people at work was based upon his stated pain level. Null

testified it was not her opinion claimant lacked the intellectual capacity to work.

¶55 Null and Hudson based their assessments of claimant's physical ability to work on claimant's reports concerning his limitations and upon their observations of him using a cane and wheelchair, and, in Null's case, his grabbing onto her for walking assistance. As found hereafter, I am persuaded that claimant has misrepresented his condition and limitations, that he does not now need, and did not then need a cane or wheelchair; that his pain is less than he says; and that his physical ability exceeds what he has portrayed to others and the Court. Moreover, Null's testimony concerning claimant's lack of skills flies in the face of the jobs he has held. Carmichael's assessment based on claimant's actual work experience was far more persuasive. I was totally unimpressed by Null's testimony and opinions, and have given them little weight.

Claimant's Testimony

¶56 Claimant testified that he signed the settlement agreement in early January, prior to the evaluation conducted by Meredith Hudson. During deposition, however, he acknowledged having no reason to doubt Sandy Scholl's recollection that he called to ask a question about the petition on February 4, 1997, then sent in the petition shortly after that date. (Rollins Dep. I at 43.) I find that he did not sign and return the agreement until after his January 31, 1997 conference with Null and Hudson.

¶57 Claimant testified that he understood what Hudson and Null told him about their view of his capacities but "didn't want to hear it." He further testified that he agreed to settle his claim in 1997, because he needed money and had run up some debts. (Rollins Dep. I at 50.) Finally, he testified that he only recently came to believe he was unable to work. He mentioned his counselor, David C. Segerstrom (Segerstrom), as helping him to reach that conclusion.

¶58 As to his physical capacities, claimant testified he watches television, works with two fingers on an old computer, and does some yard work. He testified he is not able to walk distances or engage in physical work for more than ten to fifteen minutes.

¶59 At trial, claimant was confronted with videotapes of some of his activities. The tapes, as discussed later on, show activities inconsistent with claimant's testimony and his representations to physicians and vocational consultants. When questioned about the videotapes, claimant maintained either that the particular activity was not difficult or that he in fact rested after the activity. He maintained the tapes do not represent his physical capabilities.

¶60 Claimant testified that he applied for social security disability during June of 1996 because he thought he would get benefits for his daughter. He claimed to have understood the application only as stating he was disabled at that particular time.

¶61 Claimant called his father to give confirmatory testimony as to his physical limitations. His father testified he had never seen his son engage in any physical activity for more than forty-five minutes at a time. According to his father, claimant rests or sits after activity. He has the impression his son is in pain most of the time, sometimes worse than others.

¶62 Claimant also called Segerstrom, a licensed clinical social worker, to support his allegation that he was mistaken as to his condition at the time he entered into the settlement. Segerstrom has been counseling claimant since October 1997. He considered claimant's initial problems to involve adjustment to his injury and a "delayed grief process" involving loss of his identity as a trucker. He has counseled claimant relating to issues of pain, pain management, adjustment to his injury, and to enhance his vocational capacity. According to Segerstrom, claimant demonstrated a "strong denial mechanism" regarding his injury and physical capacities. Segerstrom felt claimant demonstrated a "strong desire" to return to work up to November 1998, when he traveled to Missoula for an IME. He felt claimant was holding that process out as his last possible hope that the doctors would say he could return to truck driving. (Trial Test.)

¶63 Segerstrom acknowledged he was not an expert in determining a person's employability or physical capacity to work. (Id. at 10, 14.)

Post-Settlement Medical Treatment

¶64 Following settlement, claimant continued to treat with Dr. Peterson. During an examination on February 13, 1997, Dr. Peterson tested claimant's reaction to pressure to his leg while claimant was distracted through conversation. The doctor concluded claimant evidenced less pain when distracted, suggesting lack of an organic basis for the extent of the claimant's pain reports. (Ex. 3 at 12; Peterson Dep. at 8.) During that same examination, claimant requested Dr. Peterson to put him on morphine again "to enable him to continue doing his job searches." (Ex. 3 at 12.) Dr. Peterson again discussed with claimant his concerns about narcotic usage.

¶65 Claimant returned to Dr. Peterson on March 18, 1997. Claimant again asked for morphine. Dr. Peterson had another "long discussion . . . with both Mr. and Mrs. Rollins regarding my discomfort and unwillingness to continue giving him narcotics for soft tissue pain." (Ex. 3 at 9, emphasis in original.)

¶66 On April 8, 1997, Dr. Peterson noted a telephone call from claimant requesting medications for pain based upon claimant's assertion that physical therapy the prior day caused a "dramatic increase in pain of his right leg." (Ex. 3 at 5.) Dr. Peterson telephoned the physical therapist and noted as follows:

> I discussed Mr. Rollins review/update of his home program with Traci, physical therapist at Health South. There was nothing done of consequence to Mr. Rollins' right leg. He primarily had a review of his home exercises and it was the

> understanding of the therapist that Mr. Rollins was not doing any of his home exercises. He had reported to the therapist that he had recently been accepted for Social Security Disability. Actual physical exam at that time was improved from prior exam. He apparently had been scheduled at Health South on 3/27/97, was a no-show for that appointment, was rescheduled 4/01/97, was also a no-show for that appointment. He then was rescheduled 4/07/97, and is not tentatively scheduled to return to Health South.

(*Id*.)

¶67 Claimant returned to Dr. Peterson on April 17, 1997. Claimant was carrying a four-pronged cane but did not use it to bear weight. Dr. Peterson's diagnostic impression was:

> 1. Right lower extremity pain (729.5), felt to be due to post phlebitic syndrome, at maximum medical improvement.
>
> 2. Adjustment reaction with mixed emotional features, predominantly anger (309.28).
>
> 3. Delayed recovery syndrome.

(Ex. 3 at 38.) Dr. Peterson testified that at that time he believed claimant capable of working an eight-hour shift in an approved job. He recommended claimant be evaluated by Dr. John Mendenhall, a psychiatrist. (*Id*.)

¶68 On June 30, 1997, claimant was evaluated by Dr. Mendenhall. Based upon an interview with claimant and results of various psychological tests, Dr. Mendenhall diagnosed an adjustment disorder with mixed disturbance of conduct and emotions. (Ex. 6 at 1.) He further noted:

> I do not believe that Mr. Rollins is mentally ill. I do believe that he would much rather see his care givers be revealed as idiots and charlatans than get better. I do not believe he would agree with this statement if it were presented point blank but a review of the ongoing case makes this opinion unavoidable. At this time, unfortunately, I would regard him as psychiatrically and psychologically inaccessible to the point where he can be regarded as untreatable.

(*Id*.)

¶69 Claimant's final visit to Dr. Peterson was on July 21, 1997. Dr. Peterson noted no remarkable findings and his diagnostic impression remained the same. Referencing claimant's increasing expression of anger and criticism of his medical treatment, Dr. Peterson concluded he no longer had a therapeutic relationship with claimant. (Ex. 3 at 2.)

¶70 Beginning November 12, 1997, claimant began treating with Dr. Jon Walz, Jr., a Board Certified family physician. Dr. Walz diagnosed post-phlebitic syndrome, noting claimant

was "occupationally challenged" as secondary to that condition. (Walz Dep. at 5.) Dr. Walz reinstituted morphine (MS Contin) because claimant "was beginning to contemplate employment" and the doctor "felt it was important to exclude the barrier of pain as a, well, as a barrier to functional growth and employment." (Id. at 5-6.)

¶71 Claimant treated with Dr. Walz at least through early 1999. (Id. at 7.) In a deposition, the doctor testified that claimant's condition did not change appreciably over time, although he believed claimant's "subjective perception of his disorder" did evolve. (Id. at 8.) Dr. Walz believed claimant's pain "was intermittent, was associated with degree of exertion and the pacing of his tasks." (Id. at 9.)

¶72 Testimony indicates claimant underwent quadruple bypass surgery, not argued as related to his injury, during the Spring of 1999. (Null Dep. at 19.)

November 1998, Independent Medical Examination

¶73 Claimant was evaluated on November 17, 18, and 19, 1998, by a panel of physicians associated with St. Patrick Hospital in Missoula. Panel members included Dana Headapohl, M.D., Occupational Medicine, Robert Valin, Ph.D., Neuropsychology, Martin Cheatle, Ph.D., Behavioral Medicine, Alan Gabster, M.D., Cardiology, and Fred Lerch (Lerch), a physical therapist, and Judith Vos Ferneau (Vos Ferneau), an occupational therapist. (Ex. 21 at 1.) The panel report, written by Dr. Headapohl, concluded claimant's deep vein thrombosis had a "[m]ultifactorial etiology – patient's smoking history, hyper coagulability tendency and the prolonged sitting required by truck driving." (Id.) The panel expected claimant to require "the long term use of compressive stockings, pain medication and possibly a diuretic" and stated he "was at maximal medical improvement from his DVI; he does have residual pain and dependent edema." (Id. at 2.)

¶74 Dr. Headapohl reported the functional capacity evaluation (FCE) done by Lerch and Vos Ferneau showed "findings consistent with a sedentary to light physical capacity level, with decreased standing tolerance and difficulty with increased load bearing of the right leg." (Id.) The panel approved claimant for employment as a telemarketer, but disapproved employment as truck driver, furniture sales person, general sales clerk, hotel/motel desk clerk, cashier, service writer, or bus driver. (Id.)

¶75 In an individual report included in the panel evaluation, Dr. Cheatle remarked that claimant was "quite angry and very dramatic in his description of his symptoms and change in lifestyle." He also questioned claimant's "motivation to improve his clinical picture." (Id. at 37.)

¶76 In their report of the FCE, Lerch and Vos Ferneau noted "inconsistency of effort" by claimant and entered the following remarks:

> In general, Mr. Rollins was somewhat consistent in his physical presentation in that he consistently placed significantly more weight on the left lower extremity during any standing activity. It was noted, however, that Mr. Rollins placed much more equal distribution of weight on the lower extremities during portions of the examination and testing when he was engaged in some story telling. Regarding his performance between day one and day two, Mr. Rollins' ability to lift weights increased in some areas and decreased in others. Mr. Rollins rated his pain at 9-10/10 during the FCE, which was quite inconsistent with his presentation; he altered between demonstrative pain behavior and relaxed conversations and postures. Additionally, Mr. Rollins arrived on the second day of testing not wearing his compression garments and boots, stating his leg had swelled too much for him to get them on. Re-measurement of calf and thigh girth, and inspection of the ankles showed that while there was a very minimal increase in girth bilaterally (explainable by not wearing the garments), the right leg was actually closer to the left than on the first day.
>
> Taken as a whole, testing suggests that inconsistent effort was given.

(Id. at 23-24.) Lerch and Vos Ferneau further noted that "limitations to Mr. Rollins' capabilities were due to complaints of pain. There were no particular musculo-skeletal deficits other than deconditioning which limited his performance." (Id. at 25.)

The Videotapes

¶77 Six videotapes were introduced into evidence. (Ex. 29 A, B, D-G.) They show various activities of claimant as recorded by a private investigator hired by the insurer. Tapes A and B were recorded on July 18, 19, and 20, 1999. Tape D was recorded between November 15 and 18, 1998, E on February 23 and 24, 1999, F on January 19, 20, and 21, 1999, and G on January 20 and 21, 1999. The tapes are important since the recorded activities can be compared with the representations claimant has made to physicians, this Court, and vocational consultants concerning his activities and physical limitations. The Court will discuss the taped segments in date order, beginning with November 15, 1998.

¶78 Tape D - November 15-18, 1998: The November 15, 1998 tape does not show claimant. The November 16, 17, and 18, 1998 segments show claimant at various times on the dates he underwent an IME in Missoula. They begin with his airport departure (presumably Great Falls) and proceed to his airport arrival and motel check-in, then to his outside activities. Claimant uses a wheelchair during most of the segments, sometimes he uses a cane but with a pronounced limp. He uses his wheelchair when entering buildings, even though some of the entries were difficult to negotiate. In the last segment on November 18th, after his early evening return to his motel, he is videoed through his motel window. Interestingly, for a period of approximately 10 minutes he stands, paces, and gestures while apparently talking on the telephone. That segment contrasts to his dependence on his wheelchair and

pronounced limp when using a cane, seen during the previous, more public segments. The Court notes that the motel and the area where claimant was observed is near St. Patrick's Hospital, where the IME occurred. (See Investigator's notes, Ex. 31 at 20-22.)

¶79 Tapes F and G - January 19-21, 1999: The January 19, 1999 segment shows nothing of value. On the afternoon of January 20th claimant is shown walking back and forth from a house to his car with boxes and other items, loading them into the car. The loading took thirty-five minutes, beginning at 3:39 p.m., claimant closing his trunk at 4:16 and driving away at 4:18. At 4:25 p.m. the video picks up claimant parked at a garage. Claimant proceeds to unload his car, carrying boxes, boards, and other items into the garage, taking approximately 20 minutes. While some of the video shots on January 20th are unclear and others show only the top half of claimant, there are numerous clear, full shots of claimant walking and carrying items. The Court is unable to discern any limp when he is walking. On January 21st the claimant is shown in very short segments in the morning and early afternoon. His car is videoed in the parking lot of an office building adjacent to Benefis West Hospital at 2:05 p.m, then at 3:02 p.m. he his shown exiting a medical building (see Ex.21 at 10), using a cane and walking with a pronounced limp until he enters his car and drives off. The Court notes that from 2:00 p.m. to 3:00 p.m. the claimant was seeing his counselor, David Segerstrom. (Ex. 1 at 21.) Shortly thereafter he is seen walking in a park-like area, then at 3:16 p.m. returning with a paper to his car, again using a cane and walking with a significant limp to his car. Within 20 minutes, at 3:36 p.m., the videotape picks up his activities at home, showing him cleaning out his garage. While the videotape is shot at long distance, it plainly shows claimant's activities. For over an hour (3:36 p.m. to 4:39 p.m.), he picks up and carries boxes, boards, trash, and other items from inside the garage to the side of the garage, discarding them in a pile or in a garbage can. Some objects were large and required him to use both hands to carry them, including some sort of panel or box that was in the range of 4 feet wide by 6 to 8 feet tall. He carried boards as long as 6 to 8 feet. Often he carried items in both hands. If anyone reading this decision doubts the Court's ultimate finding that claimant has deliberately exaggerated his disability, the Court invites the reader to compare the videotapes of claimant on November 16 to 18, 1998, when he was in Missoula for an IME and his exiting his counselor's office at 3:02 p.m. on January 21st, on the one hand, and the hour of continuous garage cleaning that began at 3:35 p.m. on January 21st.

¶80 Tape E - February 23-24, 1999: The video for these dates shows brief segments (one to perhaps three to four minutes) where claimant is walking to and from his car or near buildings. In one segment the claimant is using a cane (see ex. 31 at 9), in the remainder he is not. He walks in some with a limp, although not nearly as pronounced as seen in the Missoula, November 1998 tapes, and in others a limp is not noticeable.

¶81 Tapes A and B - July 18-20, 1999: Claimant's first deposition was taken July 19, 1999, commencing at 1:00 p.m. Tapes A and B therefore contain segments for the day of the deposition and the days before and after. The segments for July 18th are brief. In the morning, claimant is shown going to a shopping center and returning using a cane and limping but not close to the degree he limped in the November segments. Later that day, he is shown in several brief segments walking around near his garage. He appears to walk freely, with no signs of difficulty, and does not use a cane. On July 19th there are brief segments of claimant rolling a tire in his driveway at home, without a cane; going to a pawn shop, using a cane. Not filmed, but included in the investigator's report, was a short trip to a cigarette store, where he did not use a cane. (Ex. 31 at 3.) During his deposition, claimant did not report these activities when asked what he did on the morning of the deposition. (Rollins Dep. I at 66, 67.)

¶82 During his July 19, 1999 deposition, claimant testified his leg was sore and he planned to sit the rest of the day with his leg propped up. (Rollins Dep. I at 62.) He also testified that all that he had done between awakening that morning and attending the deposition was to "take a shower." (Id. at 66-67.)

¶83 The tapes also show claimant just before the deposition, during a deposition break, and leaving the deposition, each time using a cane. At 3:47 p.m. that same afternoon, claimant is shown walking toward and getting into his car without the use of a cane and with little evidence of a limp. From 3:52 p.m. to 4:07 p.m., a fifteen-minute period, he is shown talking to his father at a road side stand, alternately standing, walking, and sitting, without cane or noticeable limp. Around 4:38 that same afternoon, claimant is shown walking around the area of his driveway without a cane. Between approximately 6:00 p.m. and 8:00 p.m., claimant is shown walking around in front of his residence, standing to converse with a neighbor, kicking and pulling a hose in his front yard, squatting to pet a dog, and bending to adjust the hose. He does not use a cane on these occasions. In some instances, he appears to have a slight limp or to position his right leg to avoid placing weight on that limb, but he also at times places his full weight while standing on his right, bad leg. (Tape A, 7:49 and 7:56 p.m.) On the afternoon of July 20th, claimant is shown in his front yard for fifteen minutes, moving a hose with his foot and then standing and talking, sometimes moving about, all without a cane or significant limp.

Medical Testimony

¶84 Three physicians -- Drs. Headapohl, Peterson, and Walz -- testified in this proceeding. All viewed the videotapes and took them into consideration in their testimony.

¶85 Dr. Headapohl testified by deposition. She headed the medical panel that conducted the November 1998 IME. She testified the panel's notation about "residual pain and dependent edemas," and the panel opinions regarding jobs, were based on claimant's subjective complaints. Dr. Headapohl testified that her opinions changed after viewing the

videotapes. (Headapohl Dep. at 26-28, 40.) She testified that the discrepancies between claimant's clinical presentation and his videotaped activities could not be explained based upon the levels of his medication "[b]ecause his behavior is entirely inconsistent with what he represents as occurring all the time routinely and his behavior, even on that very day, seems to vary with situation." (Headapohl Dep. at 42; emphasis added.) After reviewing the videotapes, Dr. Headapohl approved jobs as telemarketer, phone sales consultant, professional debt collector, customer service representative, and answering service operator. (Headapohl Dep. at 30-32; and Dep. Ex. 4.) She also approved the positions of school bus operator and truck driver (sand and gravel) assuming claimant is allowed to stretch and meets other requirements for driving. (Headapohl Dep. at 32-33.) Positions of service writer and furniture salesperson were approved assuming claimant is able to change positions. (Headapohl Dep. at 32, 37.) The doctor disapproved the position of truck driver because of extended sitting, and the position of general sales clerk because sitting was not permitted in the position as described. (Headapohl Dep. at 33, 37.)

¶86 Dr. Peterson testified both at trial and by deposition. He testified there was a significant difference between claimant's presentation during examinations and his physical capabilities demonstrated in the videos. Dr. Peterson was particularly impressed by claimant's basic body language during a forty-five minute stretch of videotaped activities. He saw nothing to demonstrate claimant suffered progressive muscle fatigue or change in gait. With regard to claimant's July 19th activities, Dr. Peterson testified: "the biggest difficulty I have is the dramatic differences between his public behavior and his private behavior." (Peterson Dep. at 26.) "When he's in private or what is assumed private activities, he walks without a limp. He does not use wheelchair or a cane. But 20 minutes earlier, when he was in public viewing, he had a pronounced limp and used the cane." (Id.) According to the doctor, the non-public portion of the tape showed claimant "easily flexing his right hip and knee, positioning his right lower extremity in a dependent, as well as a weight bearing position, without evidence of pain behaviors or hesitation." (Id. at 16.) Dr. Peterson found claimant's flexibility and mobility, in bending down to pet a dog, in getting in and out of a car, in moving a sprinkler and hose, significant for lack of pain behaviors. (Id. at 16). At trial, the doctor testified such movements were fluid and did not support claimant's contention of disability.

¶87 As did Dr. Headapohl, Dr. Peterson testified that pain medication would not explain the discrepancies. In his opinion, medication could dampen pain, but not in the time frame observed in the videos.

¶88 Based upon claimant's videotaped activities, Dr. Peterson approved jobs of telemarketer, phone sales consultant, professional debt collector, customer service representative, answering service operator, furniture salesperson, general sales clerk, school bus driver, service writer, truck driver (sand and gravel), hotel/motel desk clerk, and cashier.

¶89 Having personally observed Dr. Peterson's trial testimony, I found his opinions persuasive and convincing.

¶90 Dr. Walz also testified by deposition following review of the videotapes. (Walz Dep. at 11.) Dr. Walz testified that activities on January 20 and 21, 1999, reflected a higher level of physical exertion and tolerance than the doctor was aware claimant could perform. (Id. at 12.) Dr. Walz testified claimant's "functional capacity, as far as movement, was good" and "there didn't appear to be dysfunction or splinting associated with the activity." (Id.) Dr. Walz was impressed not so much with the weight of items claimant appeared to be lifting as with "the sustained standing and walking." (Id. at 13.) He agreed there was inconsistency in claimant's use of the cane on July 19th (id. at 41) and acknowledged observing no disability in claimant's July 19th movements with the hose and dog. (Id.) Dr. Walz nonetheless expressed concerns regarding claimant's ability to work and was particularly concerned about claimant's ability to sustain full-time activity, to enter data, to handle stress, and/or to act assertively. (Id. at 16-19.) Dr. Walz believed the most limiting aspect of claimant's condition was "the pain that is associated with exertion." (Id. at 28.) He believed, however, there was potential for claimant's improvement "based on improved overall health, reduction in obesity, improvement of aerobic capacity, elimination of concomitant risk factors such as tobacco use." (Id.)

Resolution

¶91 Based upon review of the entire record, and observation of claimant's demeanor at trial, I find that, while claimant does experience some degree of leg pain, he has exaggerated and misrepresented his pain and disability to physicians, vocational consultants, and the Court. I am persuaded by Dr. Headapohl's and Dr. Peterson's opinions concerning his physical ability to work. I am persuaded by Carmichael's vocational opinions and find that the jobs identified as within claimant's physical and vocational abilities exist and are accessible to claimant.

¶92 I give little weight to concerns about claimant's anger, stress, or other such factors as impacting claimant's ability to work. He has not seriously attempted to find work and has misrepresented his functional abilities. Records from Dr. Davis indicate claimant's problem is motivation and lack of interest in positions other than truck driving. Dr. Mendenhall, a psychiatrist, concluded claimant is primarily interested in criticizing his care- givers, but found no mental illness preventing employment. Dr. Peterson testified at trial he did not believe claimant's anger would prevent his employment.

¶93 In deciding this case, I have given no weight to the testimony of Ruby Rollins, who is in the process of divorcing the claimant. While some of her testimony is buttressed by other evidence, her ongoing custody dispute with claimant casts sufficient doubt on her motivation to warrant my disregarding her testimony. Moreover, the record contains ample evidence to support findings without consideration of her evidence.

¶94 Claimant is not permanently totally disabled. There was no mutual mistake of fact as to claimant's disability.

CONCLUSIONS OF LAW

¶95 Claimant's entitlement to benefits is governed by the 1993 Workers' Compensation Act, which was the law in effect at the time of his June 1, 1995, injury. Buckman v. Montana Deaconess Hospital, 224 Mont. 318, 321, 730 P.2d 380, 382 (1986).

¶96 Claimant bears the burden of persuading me, by a preponderance of the evidence, that he is entitled to benefits. See Ricks v. Teslow Consolidated, 162 Mont. 479, 483-84, 512 P.2d 1304 (1973); Dumont v. Aetna Fire Underwriters, 183 Mont. 190, 201, 598 P.2d 1099 (1979).

¶97 Claimant's initial burden is to convince the Court to set aside the settlement. A full and final settlement of a workers' compensation claim is a contract, thus contract law governs the agreement. Kienas v. Peterson, 191 Mont. 325, 329, 624 P.2d 1, 3 (1980). A contract may be rescinded when the parties were laboring under a mutual mistake regarding a material fact when the contract was made. South v. Transportation Ins. Co., 275 Mont. 397, 401, 913 P.2d 233, 235 (1996). The contract may be rescinded only "where the parties share a common misconception about a vital fact upon which they based their bargain." Mitchell v. Boyer, 237 Mont. 434, 437, 774 P.2d 384, 386 91989) (citations omitted; emphasis added).

¶98 The mistake of fact argued by claimant is that the parties mistakenly believed claimant was able to work. Claimant argues he was and is permanently totally disabled. Thus his argument for reopening the settlement dovetails with the second issue raised by the pretrial order, which is whether claimant is permanently and totally disabled. If claimant is not permanently totally disabled, then the parties were not mistaken under the theory alleged by claimant.

¶99 Claimant has not proven permanent and total disability. He is able to work and is employable. There was no mutual mistake of fact and therefore no basis for reopening the settlement.

JUDGMENT

¶100 1. Claimant is not entitled to reopen the settlement agreement.

¶101 2. Claimant is not entitled to benefits for permanent and total disability.

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

¶103 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 3rd day of February, 2000.

(SEAL)

\s\ Mike McCarter
JUDGE

c: Mr. Randall O. Skorheim
Mr. Larry W. Jones
Date Submitted: October 15, 1999