

IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

1994 MTWCC 71

WCC No. 9310-6914

JAMES VOSSLER

Petitioner

vs.

LUMBERMENS MUTUAL CASUALTY

Respondent/Insurer for

INTERSTATE BRANDS CORPORATION

Employer.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND JUDGMENT

The trial in this matter was held on February 1, 1994, in Billings, Montana. Petitioner, James Vossler (claimant), was present and represented by Mr. Thomas J. Lynaugh. Respondent, Lumbermens Mutual Casualty (Lumbermens), was represented by Mr. Thomas A. Marra. Claimant was sworn and testified on his own behalf. Marilee Vossler, Patrick Stephenson, Donna Veraldi, Ph.D., and Wallace Mercer were also sworn and testified at trial. Exhibits 1 through 7 were admitted into evidence. The depositions of James Vossler, Steven Kuehn, Debra Weisgarber, Richard Agosto, Ph.D. and Patrick Cahill, M.D. were accepted by the Court for consideration in reaching its decision. The parties also agreed that the Court may consider the post-trial deposition of Bob DeVore.

Nature of Dispute: The claimant in this matter seeks a determination that he is temporarily totally disabled as a result of psychological conditions stemming from a September 4, 1990 industrial accident. He seeks retroactive reinstatement of temporary total disability benefits and payment for psychotherapy.

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

1. Claimant is 53 years old. He is married and has two adult children. Another of claimant's children is deceased as the result of a car accident in 1980.

2. Claimant is a high school graduate. He has no post-secondary education.
3. Claimant worked steadily between 1958 and 1990, a period of approximately 32 years. His work history is as follows:

1958-62 New Tread Tire Shop Sorted, cleaned and painted tires
1962-67 Thompson Dairy Driver/salesman
1967-72 Meadow Gold Driver/salesman
1972-86 Brown Swiss Dairy Driver/salesman; wholesale supervisor
1986-89 Meadow Gold (Borden's) Driver/salesman
1990-90 Sweetheart Bakery Relief driver/salesman

(Ex. 3.)

4. Claimant was laid off by Meadow Gold in October 1989 and was thereafter employed by Sweetheart on January 29, 1990. His job at Sweetheart was as a relief driver for vacationing drivers. (Exs. 3 and 4.) As a relief driver he was responsible for loading and delivering Sweetheart products to retail stores. He was also responsible for ascertaining changes in the orders of individual retailers. He drove a different route each week. A supervisor typically rode with him during his first two days on a new route to help him learn the route.

5. On September 4, 1990, the claimant suffered an industrial injury while making a delivery to a store in Fishtail, Montana. Claimant was exiting his truck when he slipped and fell.

6. According to claimant, among other things, he hit his head and was unconscious for twenty to thirty minutes. I do not find claimant's estimates of the duration of his unconsciousness to be reliable. Nonetheless, I am persuaded that claimant in fact struck his head, lost consciousness for at least a brief time, and suffered a mild cerebral concussion. Claimant sought emergency room care that evening and the emergency room records specifically mention headache, a loss of consciousness, and a "cerebral concussion." (Ex. 1 at 136-7.)

7. In addition to a mild concussion, claimant suffered "a little avulsion chip off his distal fibula" of the left leg and a left ankle sprain. (Ex. 1 at 60.) He also reported pain in his lower back and in his left arm, elbow and hand. (Ex. 1 at 136-7.)

8. At the time of the accident Sweetheart was enrolled under Plan II of the Workers' Compensation Act and was insured by Lumbermens.

9. Lumbermens accepted the claimant's initial claim for compensation and assigned it to Intermountain Claims to adjust.

10. Dr. John Dorr, an orthopedic surgeon, began treating claimant on September 5, 1990, the day following the accident. At that time Dr. Dorr fitted claimant with an ankle brace and took him off work. (Ex. 1 at 60.)

11. On September 28, 1990, Dr. Dorr approved claimant's return to work effective October 8, 1990. (Ex. 1, p. 58.)

12. Claimant returned to work on October 8, 1990, and continued to work through December 5, 1990.

13. Lumbermens paid claimant temporary total disability benefits for the period of September 5, 1990 to October 7, 1990.

14. After returning to work the claimant continued to see Dr. Dorr for follow up treatment for his ankle. He also sought treatment for pain and numbness in his neck and left hand and arm. He saw Dr. Dorr on October 31, November 7 and November 14, 1990. Dr. Dorr's office notes reflect continued improvement of the ankle, a diagnostic work-up of claimant's other complaints, including an EMG, and a prescription for physical therapy to address claimant's neck, arm and hand complaints. The office notes do not reflect any report of back pain on any of these visits, or, for that matter, on claimant's prior office visit of September 24, 1990.

15. On December 5, 1990, claimant saw Dr. Dorr and reported that his back was bothering him. Dr. Dorr's office note for that date records claimant's complaints as follows:

He reports that his ankle has been steadily getting better since his accident. However, both his neck and back, which he injured at the same time, are continuing to give him trouble. He noted at the time of his injury that he hurt his low back. He felt this was going to get better. It was x-rayed at the time of his injury. Evidently no evidence of any fracture was seen. However the back continues to bother him. *(He gets pain that goes down his left leg. Coughing and sneezing will increase his discomfort. He notes the leg is numb. He does not feel he can trust it.)*

...

His arm continues to bother him and with his combined neck and back discomfort, he's been unable to really pursue his exercise program. I am planning on getting a lumbar and cervical myelogram and will go on further treatment after we get this. Given all his difficulty, I don't think he could be working at this stage.

(Ex. 1 at 54; italics added.)

16. On December 5, 1990, Dr. Dorr took claimant off work "until further notice." The doctor's note for the employer specifically identifies claimant's "low back pain" as the reason for doing so. (Ex. 1 at 56.)

17. Lumbermens reinstated temporary total disability benefits effective December 5, 1990 and continued to pay those benefits until November 5, 1992.

18. Other than an EMG indication of possible mild left carpal tunnel syndrome (Ex. 1 at 9), subsequent medical testing failed to disclose any substantial objective basis for claimant's complaints. The doctors examining him found little physical basis for the complaints and concluded that his complaints had a largely psychological basis.

a. On December 19, 1990, Dr. Dorr reported that "[n]either the myelogram nor the CT showed any surgically correctable lesions." (Ex. 1 at 54 and see Ex. 1 at 121.)

b. On Dr. Dorr's referral, Dr. Neil Meyer, a neurosurgeon, evaluated the claimant on February 25, 1991. Dr. Meyer's impressions were:

1. I believe that most likely the patient does not have a surgical problem in his neck or back. **His symptoms seem to be somewhat out of proportion to the clinical findings. 2. I believe that there is a good chance of a large hysterical component.**

(Ex. 1 at 98; emphasis added.)

c. On July 1, 1991, Dr. Patrick Cahill, a neurologist, performed an independent medical examination. Claimant's symptoms at that time included headaches; neck, left shoulder, and left elbow pain; low back and left hip pain; left ankle pain; and numbness in the left hand and hip. Dr. Cahill found no evidence of any neurologic disease, damage, injury or disability. He noted the claimant exhibited "global" dramatic collapsing in a number of muscle groups, far out of proportion to any pain that was produced. Dr. Cahill testified by deposition that this collapsing was due to **"some psychological factor that is occurring."** (Cahill Dep. at 12.) He concluded that claimant was suffering muscular contraction headaches; cervical, thoracic and lumbar strain; and possible mild left carpal tunnel syndrome. He further noted claimant's symptoms were out of proportion to objective findings, **"suggesting a psychological component."** (Ex. 1, p. 7-10.)

d. In a September 12, 1991 letter to Patrick Stephenson of Intermountain Claims, Dr. Dorr stated:

Neither myself nor Doctor Neil Meyer felt that he had any lesions that required surgical treatment. He was also evaluated by Doctor Cahill who could not find any significant neurological abnormality. Both Doctor Meyer and Doctor Cahill felt there was some psychological component to his symptoms. All three of us have felt that he should be increasing his activities and do not feel that he would be harmed by returning to some type of sedentary or semi-sedentary occupation.

I feel that limitations and restrictions that he has could best be determined by a formal Functional Capacities Evaluation.

I do feel that the primary reason he continues to be disabled is his pain. As we know, pain is a combination of organic stimulus and the patient's reaction to it. In Mr. Vossler's case, the pain does seem to date from the time of his accident.

(Ex. 1, p. 46-47.)

e. Dr. Cahill examined claimant again in March of 1992. Claimant's complaints at that time included low back pain, shoulder pain, neck pain and headaches. Dr. Cahill again found no evidence of any neurological abnormality. While he noted the presence of degenerative disc disease of claimant's neck and back, he did not feel that these conditions were causing the claimant's symptoms. His medical impression at that time was:

Musculoskeletal strain **with strong functional overlay** with no evidence of neurologic disease, damage or injury on neurologic examination. [Emphasis added.]

Dr. Cahill further noted that an EMG/NCV study by Dr. See suggested carpal tunnel syndrome of the left arm but saw "no evidence clinically for that condition and there is no fixed motor or sensory deficit which indicates that it is mild and I would do nothing about it." (Ex. 1 at 4-5.)

f. Dr. James H. Johnson, a neurosurgeon, saw claimant on November 4, 1992. He did not feel that there was a surgical option available to the claimant and stated tersely, "I think the man needs a psychological evaluation and testing." He recommended that claimant "be evaluated by a neuropsychologist such as Dr. Agosto for pain control." (Ex. 1 at 111-113.)

g. Dr. Donald H. See performed an independent medical examination on claimant on January 20, 1993.⁽¹⁾ Dr. See diagnosed degenerative disc disease in the lumbar and cervical spine. He concluded that claimant's clinical condition was stable and that he had reached maximum medical recovery. He rendered an impairment rating of 9 percent due to claimant's degenerative disc disease. He did not place any restriction on claimant or make any recommendations concerning return to work. In his narrative concerning his physical examination, Dr. See noted that claimant "exhibits quite remarkable amplified pain behavior throughout all phases of the physical examination" and "exhibits quite irregular effort and much guarding." (Ex. 1 at 99-102.)

19. Based on the subjective nature of claimant's symptoms, and indications that psychological factors were contributing to those symptoms, Intermountain requested that claimant be examined by Donna Veraldi, Ph.D., who is a clinical psychologist. Dr. Veraldi examined claimant on October 30 and 31, 1991, and performed extensive psychological

testing. She thereafter conducted additional review and investigation, ultimately concluding that claimant is either malingering or suffers from a factitious disorder. (Tr. at 132.) She defined malingering and factitious disorder in the following terms:

[B]oth of these terms are terms used to talk about a purposeful production of symptoms. That malingering is felt -- is a term used when somebody is pursuing more consciously, a purposeful goal in producing symptoms out of proportion to findings; that factitious disorder is used when somebody is producing those symptoms, the goal is not quite so clear, but they probably have rather compelling psychological reasons to produce symptoms. There is some need in their life and that production of symptoms fills the need.

(Tr. at 133.) She agreed that claimant also suffers from some degree of depression but also opined that claimant is not precluded from returning to work as a result of any psychological disability directly attributable to his industrial accident. (Tr. at 140-1.) A more detailed discussion of Dr. Veraldi's opinions is set forth later on in these findings of fact.

20. Dr. Veraldi provided her opinions to Intermountain in a letter dated January 31, 1992.

21. Lumbermens, through Intermountain, terminated claimant's temporary total disability benefits effective November 5, 1992, based on Dr. Cahill's October 1, 1992, letter stating that claimant was not physically precluded from returning to work at his time-of-injury job (Ex. 1 at 1) and on Dr. Veraldi's earlier opinion that claimant was not disabled on account of any psychological condition attributable to his industrial accident. (Tr. at 89.)

22. In the present action the claimant is seeking reinstatement of temporary total disability benefits retroactive to November 5, 1992, as well as payment for psychotherapy. He does not contend that his physical injuries are disabling but rather that he is disabled on account of a closed head injury and psychological conditions stemming from his industrial accident. His case rests on his own testimony, the testimony of his wife, and the opinions of Richard Agosto, Ph.D., a clinical psychologist who has treated the claimant since December, 1992.

23. Dr. Agosto testified that claimant suffers from (1) depression, which is evidenced by a general loss of interest in almost any type of activity, a pessimistic attitude, unhappiness, weight loss, sleep disturbance, headaches, bowel disturbance, withdrawal, confusion and forgetfulness (Agosto Dep. at 17-18; Ex. 1 at 20, 33-4); (2) a mild type of organic brain impairment, for which there is no specific diagnosis, exhibited by poor attention and concentration, poor recent memory, difficulty in sustained thinking, distractibility, difficulty in adapting, and difficulty in abstract conceptualization (Agosto Dep. at 18); and (3) a somatoform disorder, which is the *unconscious* exaggeration of pain (*Id.* at 49-50). In Dr. Agosto's opinion, "some elements" of organic brain disorder pre-existed the accident but

the accident aggravated the disorder. In his further opinion, the claimant's depression and somatoform pain disorder were triggered by the accident.

24. Claimant requests the Court to adopt Dr. Agosto's opinions and reject those of Dr. Veraldi. He argues that Dr. Agosto's opinions are more persuasive than those of Dr. Veraldi because Dr. Agosto has been treating claimant on a regular basis since December 1992, and has seen him on 29 occasions. He also stresses claimant's long history of steady employment and his handling of his son's death⁽²⁾ as militating against Dr. Veraldi's conclusions and supporting those of Dr. Agosto. I have carefully considered those matters in making my findings but find that they are overcome by other evidence in this case.

25. On the basis of all the evidence in this case, including my assessment of claimant at trial, I find that Dr. Veraldi's opinions are the more persuasive. Claimant has failed to persuade me by a preponderance of reliable, credible evidence that he is disabled on account of a psychological condition or conditions caused by his September 4, 1990 industrial accident. My reasons for reaching this ultimate conclusion are set forth in the following paragraphs.

26. I did not find claimant to be a reliable or credible witness.

27. Prior to his injury the claimant was having trouble performing his job. He took longer than normal to complete his route and needed help from his supervisors in calculating customer orders. While the evidence presented by Lumbermen's failed to establish that claimant had difficulty performing his job duties during his prior employments, he was clearly having difficulty in meeting his duties at Sweetheart.

28. On July 30, 1990, five weeks before his accident, claimant was given a written warning concerning his poor job performance. The warning identified three areas in which claimant was deficient. Those areas were: " (1) running route within the realm of a reasonable starting and finishing time, and reasonable account service time, (2) taking care of adds and cuts, special order forms and other necessary side duties, and (3) code and picking up product on code." (Vossler Dep. Ex. 1.) Sweetheart has a progressive disciplinary policy of (1) verbal warning, (2) written warning, (3) five day suspension, and then (4) discharge if the employee's performance fails to improve. Claimant had therefore already reached the second stage of discipline.

29. Claimant testified that one of his supervisors,⁽³⁾ Bob DeVore, took him to lunch in August of 1990, gave him a raise, and told him that he was doing a good job. In light of the recent written warning, it seems unlikely that the conversation occurred, and Mr. DeVore denied that it had in fact occurred. The claimant offered evidence that he had received a raise. That evidence was in the form of a pay stub indicating that claimant received a raise on June 23, 1990. Sweetheart managers were unsure of the reason for the raise, which amounted to eighteen cents an hour, but more significantly the raise was given more than a

month *prior* to claimant's written reprimand. I find that claimant's story regarding the August meeting is incredible and is a fabrication to bolster his claim in this case.

30. Following the written warning, claimant's performance continued to be substandard and he continued to require extra assistance from his supervisors.

31. After his industrial accident the claimant was able to physically perform his job for a period of two months. His performance continued to be substandard but did not get any worse on account of his injuries, although he claims it did.

32. Prior to November 26, 1990, claimant's supervisors told him that it was possible he would be laid off for lack of work. On November 26, 1990, claimant was given notice that he was being laid off work effective December 8, 1990. Claimant denies that he was ever told of the layoff, but I do not find his denial credible.

33. In his visits to Dr. Dorr during October and November, 1990, claimant did not complain of low back pain while complaining of arm, hand and neck symptoms. The medical records in this case indicate that claimant freely complained to his physicians and often exaggerated his complaints. I find it unlikely that claimant would *not* have complained of low back pain had he been experiencing back pain during October and November of 1990.

34. I find that it was more than a coincidence that claimant's complaints of severe back pain, which included pain radiating into one of his legs, began shortly after he was notified that he was being laid off.

35. After December 5, 1990, there is a clear pattern of exaggerated complaints. The nature of some of the exaggerations is strongly suggestive that the exaggerations were conscious and deliberate:

a. In his February 25, 1991 examination of claimant, Dr. Neil Meyer noted that claimant "*claimed decreased sensation over the entire left half of the chest and abdomen, and the entire left leg*, although position and vibration sensation were intact [sic]." Dr. Meyer went on to note that claimant's "symptoms seem to be somewhat out of proportion to the clinical findings" and concluded that "there is a good chance of a large hysterical component." (Ex. 1 at 98; italics added.)

b. Dr. See, who examined claimant on January 20, 1993, noted "quite remarkable amplified pain behavior *throughout all phases of the physical examination*." (Ex. 1 at 100; italics added.)

c. In his report of a July 1, 1991 examination Dr. Cahill noted:

Strength testing showed *diffuse collapsing weakness in both upper extremities and left lower extremity globally* with less, but still present collapsing weakness in the right lower extremity This collapsing

weakness was still present even with minimal pain production . . . *The degree of collapse was far out of proportion to the degree of strength exhibited on functional capacity assessment such as walking, hopping, etc.*

Describing the sensory portion of the exam, Dr. Cahill noted that the exam was "diminished to vibration, pin and temperature *over the entire left upper and left lower extremities slightly, globally and sparing the trunk and face.* " Following the examination Dr. Cahill commented: "Symptoms out of proportion to findings suggesting a psychological component." (Ex. 1 at 9; italics added to quoted material.)

d. In his deposition Dr. Cahill described his March 24, 1992 examination of claimant. Among other things, he said:

[H]e followed commands, but would do them very slowly and deliberately, with much hesitation I noted that he seemed to elaborate and exaggerate his hesitance, and that was most marked on gait testing.

. . . .

And under "MOTOR EXAM" he had, again, marked hesitancy *in all motor testing*, but he did all the tasks correctly and was reasonably adroit, although occasionally would stumble or lurch, but was always able to correct his own balance and catch himself. So I did not have to stand there and be his cane for him. He corrected his own balance adroitly. *Then the next time he would be able to perform the task, for example, tandem walking, perfectly well without hesitation.*

Finger-to-nose testing showed that he would *miss his nose* He wouldn't touch the tip of his nose, but he would touch virtually exactly the same spot . . . same spot reproducibly every time. So that's kind of a - - *That's a finding that indicates a major psychological or a significant psychological component.* . . . he reproducibly has the accuracy to touch this spot (indicating) every time. So that tells me that, neurologically, . . . all of that is perfectly fine, *but it also tells me there's a significant psychological component, to this patient.* And that's, again, a medical term that's used to describe someone who is hysterical, and that also is a medical term. That doesn't mean someone who is screaming and yelling that you'd see in a movie. *This is someone who has a significant psychological impairment that contributes and creates the symptoms present at that time.*

(Cahill Dep. at 25-27; italics added.)

36. Dr. Agosto first examined the claimant in May of 1991 at the suggestion of Dr. Dorr. He administered an MMPI (a personality and emotional functioning test) and the Beck Depression Scale.⁽⁴⁾ After evaluating him again a year and a half later on December 3, 1992, Dr. Agosto provided the following retrospective of the May 1991 evaluation:

In May, 1991, Mr. Vossler was obviously more controlled and able to show some ability to screen out some of his complaints and difficulties. At that time, he had a 14 on the Beck scale which only shows *mild dissatisfaction*. His MMPI in May of 1991 was generally quite elevated but on an overall basis he showed less emotional distress

(Ex. 1 at 43.)

37. Dr. Agosto's next examination of claimant occurred on December 3, 1992, after claimant's benefits had been terminated and he had retained an attorney.

38. Dr. Veraldi performed far more extensive testing and evaluation of claimant than did Dr. Agosto. Her testing included the Wechsler Adult Intelligence Test, Revised form; the Halstead-Reitan Neuropsychological Battery; the MMPI; a Wide Range Achievement Test; a Bender Motor Gestalt Test; the Graham-Kendall Memory for Design and the Wechsler Memory Test.

39. Claimant's responses to the tests administered by Dr. Veraldi were exaggerated and invalid. Dr. Veraldi testified that the neuropsychological tests performed on claimant "did not make sense." The sensory and auditory tests indicated claimant could not hear or feel anything on his left side. Dr. Veraldi testified the sensory and auditory test results were:

[h]ard to put this together because to lose your hearing from your left ear in that type of accident, it would be very extraordinary.

But you have to understand that the nerve that comes deep within behind the ear, goes into the brain stem, divides and goes to both sides of the brain. So if you only hit your brain, you don't lose auditory sensation very easily, because its cross wired to both sides of the brain. It would be very hard simply with a blow to your head to have a significant hearing loss. . . . [W]ithout just an incredible blow to this side, you wouldn't get that type of -- what is called contrecoup damage.

(TR. at 125-126.) There was no medical evidence presented which would substantiate claimant's responses on the sensory and auditory testing. Other tests administered by Dr. Veraldi had abnormal scores. The testing suggested very diffuse brain damage inconsistent with the nature of claimant's accident and indicating an accident that claimant would not have been able to walk away from. A test indicative of malingering was also administered. Claimant's responses were indicative of exaggeration. The MMPI test Dr. Veraldi

administered reflected severe depression to a degree that one would anticipate "some vegetative signs of depression." (Tr. 122-128.)

40. Dr. Veraldi criticized Dr. Agosto's conclusion that claimant had suffered a head injury from the accident. She noted that Dr. Agosto did not perform "any tests that are of a neuropsychological nature" and she did not see any basis for his diagnosis. She did agree, however, that claimant probably suffers from some degree of learning disability which ante-dated his industrial accident.

41. Dr. Veraldi acknowledged that claimant may have a somatoform disorder to a degree, but in her opinion the forensic diagnostic criteria for such a diagnosis have not been met and in any event it is not disabling.

42. Dr. Veraldi is well qualified with respect to the evaluation and opinions she provided in this case. She is a licensed clinical psychologist with specific experience in the field of forensic psychology. She is a member of the American College of Forensic Psychology and has testified in both state and federal courts in Montana, Wyoming, North Dakota and South Dakota. She has testified concerning psychosocial injuries. She is a medical advisor to the Office of Hearings and Appeals for Social Security matters.

43. A somatoform pain disorder is a psychological reaction to a physical injury or illness which is in excess of how most people would behave. It differs from malingering and factitious disorder in that it is an *unconscious* exaggeration of symptoms whereas the latter conditions involve a conscious exaggeration of symptoms.⁽⁵⁾

44. In summary, I find that since claimant was laid off work he has consistently and consciously exaggerated and fabricated physical and psychological symptoms. Claimant is either malingering or is suffering from a factitious disorder. While Dr. Veraldi was unable to determine which of the two conditions is the driving force of claimant's exaggeration and fabrication, after viewing all of the evidence in this case I am persuaded that claimant is not malingering but is suffering from factitious disorder. I am not persuaded that he is exaggerating and fabricating for the specific purpose of obtaining workers' compensation or other benefits. I am, however, persuaded that his conduct is consciously aimed at gaining sympathy and excusing his unsatisfactory job performance and his lay-off from work, and that he is at least aware that his conduct may also may benefit him financially.

45. I also find that to the degree the claimant may suffer from depression and any somatoform disorder, those disorders are not attributable to claimant's industrial accident.

46. Claimant is not disabled from returning to his time-of-injury job on account of his September 4, 1990 industrial accident.

47. Dr. Veraldi testified, and the Court finds, that claimant needs psychotherapy to manage his symptoms and "get back to functioning in his life." (Tr. at 139.) However, claimant's need

for psychotherapy does not undermine the finding that he is suffering from a factitious disorder. Claimant clearly needs assistance in breaking out of his present pattern of behavior.

CONCLUSIONS OF LAW

1. Section 39-71-116(28), MCA, (1990) defines temporary total disability as "a condition *resulting from an injury as defined in this chapter* that results in total loss of wages and exists until the injured worker reaches maximum healing." (Italics added.) The claimant has the burden of proving that he is entitled to such benefits, **Ricks v. Teslow Consolidated**, 162 Mont. 469, 512 P.2d 1304 (1973), and he must prove his entitlement by a preponderance of the probative, credible evidence. **Dumont v. Wicken Bros. Construction Co.**, 183 Mont. 190, 598 P.2d 1099 (1979). That burden extends to proof that "the injury was the proximate cause of his disabling condition." **Eastman v. Transport Ins.**, 255 Mont. 262, 843 P.2d 300 (1992). The claimant has not carried his burden.

The law in effect at the time of the claimant's injury applies in determining his entitlement, if any, to benefits. **Buckman v. Montana Deaconess Hospital**, 224 Mont. 318, 321, 730 P.2d 380 (1986). In 1987 the definition of injury was amended to exclude mental conditions "arising from: (a) emotional or mental stress; or (b) a non physical stimulus or activity," section 39-71-119, MCA (1989), and that exclusion was in effect on the date of claimant's injury.⁽⁶⁾ Claimant alleges, however, that he suffers from a disabling mental condition which arises from the physical injuries he suffered on September 4, 1990.

Under pre-1987 law, a psychological condition caused or aggravated by a work-related physical injury was compensable. In **O'Neil v. Industrial Accident Board**, 107 Mont. 176, 183, 81 P.2d 688 (1938), the Supreme held that "neurosis resulting from an injury in an industrial accident is compensable." In **Schumacher v. Empire Steel Manufacturing**, 175 Mont. 411, 574 P.2d 987 (1977), it held that there was coverage for psychological conditions aggravated by work-related physical injuries. In **McMahon v. Anaconda Company**, 208 Mont. 482, 486, 678 P.2d 661 (1984), the Court, citing **Schumacher**, said, "This Court has held that psychological disability stemming from a work-related injury is compensable under the Workers' Compensation Act." (Emphasis added.) In **O'Neil** the claimant suffered a physical injury to his back. After his healing period had ended he continued to suffer pain, but his physicians could find no physical cause for the pain and attributed it to post-traumatic psycho-neurosis. In **Schumacher** the claimant suffered physical injuries to his neck, shoulder and arm. The injuries healed but claimant continued to suffer pain. Finding no physical basis for his continued pain, claimant's physicians attributed it to hypochondriacal neurosis. In each of the cases the psychological condition determined to be compensable was a direct consequence of a compensable physical injury.

The 1987 amendment of the injury definition does not exclude mental conditions which are caused or aggravated by a physical injury otherwise meeting the injury definition.⁽⁷⁾ The pre-

1987 cases therefore control the decision in this case. If claimant is totally disabled due to a psychological condition proximately caused or aggravated by his September 4, 1990 physical injuries, then he is entitled to temporary total disability benefits.

The Court has found as fact that the claimant's disabling symptoms are the consequence of a factitious disorder. This condition involves conscious exaggeration or fabrication of physical or mental symptoms. Factitious disorders are characterized as psychological disorders under the DSM-III-R. However, the claimant does not contend that a factitious disorder is a compensable condition under the Workers' Compensation Act, and I conclude here that the Act does not countenance the conscious exaggeration or fabrication of disabling symptoms, whatever the underlying reason, motivation or excuse. Conscious exaggeration and fabrication have dishonesty and deception at their nuclei. It is beyond this Court's comprehension that in enacting the Montana Workers' Compensation Act the legislature intended to compensate workers for dishonesty or deception, and pre-1987 court precedent cannot be read as supporting such result since those decisions addressed psychological conditions which were unconscious or involuntary.

The relief sought by the claimant must also be denied because of his failure to prove that his mental conditions were proximately caused by the physical injuries he suffered in his industrial accident. An essential element of any claim for compensation is proof of a direct relationship between the industrial accident and the disabling condition. **Schwartzkopf v. Ind. Acc. Bd.**, 149 Mont. 488, 493, 428 P.2d 468 (1967). I have found as a matter of fact that claimant's factitious disorder, as well as his other mental conditions, are not directly related to his industrial accident and were not proximately caused by the accident. They are more likely than not precipitated by his layoff and job deficiencies. Therefore, he has failed to establish a necessary nexus between his mental conditions and his industrial accident.

Accordingly, claimant is not entitled to a reinstatement of temporary total disability benefits or to payment for his psychotherapy.

2. Claimant is not entitled to costs.

JUDGMENT

1. Claimant is not entitled to reinstatement of temporary total disability benefits or to payment for psychotherapy, or to any other relief.

2. The parties shall pay their own costs.

3. The JUDGMENT herein is certified as final for purposes of appeal pursuant to ARM 24.5.348.

4. Any party to this dispute has 20 days in which to request a rehearing from these Findings of Fact and Conclusions of Law and Judgment.

DATED in Helena, Montana, this 10th day of August, 1994.

(SEAL)

/s/ Mike McCarter

JUDGE

c: Mr. Thomas J. Lynaugh

Mr. Thomas A. Marra

1. Dr. See had previously performed needle EMG studies of claimant's right arm and the right side of his neck. Those studies were done on November 7, 1990 and October 14, 1991. (Ex. 1 at 105-110.) An EMG was also performed on August 11, 1992, and was normal except for electrical "latencies through the wrist of uncertain significance" but which "would support a clinical diagnosis of carpal tunnel syndrome." (Ex. 1 at 103.)

2. Claimant points out that his employment was not interrupted by his son's death in 1980.

3. Sweetheart had numerous routes and drivers. Supervision of the various routes was split among three different supervisors. Since he filled in for drivers throughout the company, claimant reported to all three supervisors. On any particular route he was supervised by the particular supervisor who was responsible for the route.

4. The Beck Depression Scale is a multiple choice questionnaire which asks the individual responding to tell how he or she feels. For example, the first question answered by claimant was:

A.

0 I do not feel sad.

1 I feel sad.

2 I am sad all the time and I can't snap out of it.

3 I am so sad or unhappy that I can't stand it.

(Agosto Dep. Ex. (no number or page).) Dr. Veraldi testified that the questionnaire is not a valid forensic tool (Tr. at 134), and the questionnaire certainly relies on the subjective reports of the claimant.

5. The DSM III-R, which claimant's attorney used to cross-examine Dr. Veraldi and which is cited in Petitioner's Proposed Findings of Fact, defines "factitious" as meaning "not real, genuine, or natural." It goes on to state that "Factitious Disorders are therefore characterized by physical or psychological symptoms that are intentionally produced or feigned." (Page 315.) It differs from malingering in that malingering has a specific goal while

the goal in a Factitious Disorder may be more vague and reflect a "psychological need to assume the sick role." (*Id.*)

6. The exclusion was recently discussed and applied in *Gordon C. Collins v. State Compensation Insurance Fund*, WCC No. 9305-6801 (February 3, 1994).

7. The full text of the injury definition, section 39-71-119, MCA (1989), is:

39-71-119. Injury and accident defined. (1) "Injury" or "injured" means:

- (a) internal or external physical harm to the body;
- (b) damage to prosthetic devices or appliances, except for damage to eyeglasses, contact lenses, dentures, or hearing aids; or
- (c) death.

(2) An injury is caused by an accident. An accident is:

- (a) an unexpected traumatic incident or unusual strain;
- (b) identifiable by time and place of occurrence;
- (c) identifiable by member or part of the body affected; and
- (d) caused by a specific event on a single day or during a single work shift.

(3) "Injury" or "injured" does not mean a physical or mental condition arising from:

- (a) emotional or mental stress; or
- (b) a nonphysical stimulus or activity.

(4) "Injury" or "injured" does not include a disease that is not caused by an accident.

The September 4, 1990 incident satisfied all aspects of the definition.