

**IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA**

**1995 MTWCC 61**

**WCC No. 9406-7066**

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**EDWIN TAYLOR**

**Petitioner**

**vs.**

**STATE COMPENSATION INSURANCE FUND**

**Respondent/Insurer for**

**MONTANA DEPARTMENT OF HIGHWAYS**

**Employer.**

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**FINDINGS OF FACT, CONCLUSIONS OF LAW AND JUDGMENT**

**AFFIRMED** [No. 95-484](#)

**Summary:** Truck driver for the Montana Department of Transportation filed three claims for compensation. State Fund accepted liability for each claim and paid benefits. Following investigation, State Fund alleged the claims were fraudulent.

**Held:** With regard to two of the three claims, the insurer carried its burden of proving the nine required elements of fraud. The Court relied on credible testimony of witnesses who said claimant told them he was “scamming the system,” but also on evidence that claimant had a financial motive, was unhappy with his job and angry at his supervisors, inconsistencies in claimant’s statements to medical providers and others, lack of objective medical evidence of some injuries, and evidence that claimant exaggerated and fabricated injuries and symptoms, some of which were anatomically inappropriate. Where an insurer may maintain a civil action for fraud against a claimant to recover benefits paid, see [State Fund v. Chapman](#), 267 Mont. 484, 491, 885 P.2d 407 (1994), the claimant is liable to repay the insurer for the medical and compensation benefits paid on account of those two claims.

**Topics:**

**Fraud:** With regard to two of three claims filed by truck driver, insurer sustained its burden of proving fraud, entitling the insurer to an order of reimbursement from claimant for medical and compensation benefits paid on the two claims. In finding the insurer proved

the nine required elements of fraud, the Court relied on credible testimony of witnesses who said claimant told them he was “scamming the system,” but also on evidence that claimant had a financial motive, was unhappy with his job and angry at his supervisors, inconsistencies in claimant’s statements to medical providers and others, lack of objective medical evidence of some injuries, and evidence that claimant exaggerated and fabricated injuries and symptoms, some of which were anatomically inappropriate.

**Evidence: Fraud.** Although the Workers’ Compensation Court was made aware that a criminal proceeding alleging fraud was pending against claimant, that fact and documents pertaining to that prosecution were not evidence of fraud.

**Evidence: Fraud.** With regard to two of three claims filed by truck driver, insurer sustained its burden of proving fraud, entitling the insurer to an order of reimbursement from claimant for medical and compensation benefits paid on the two claims. In finding the insurer proved the nine required elements of fraud, the Court relied on credible testimony of witnesses who said claimant told them he was “scamming the system,” but also on evidence that claimant had a financial motive, was unhappy with his job and angry at his supervisors, inconsistencies in claimant’s statements to medical providers and others, lack of objective medical evidence of some injuries, and evidence that claimant exaggerated and fabricated injuries and symptoms, some of which were anatomically inappropriate.

The trial in this matter was held on February 23 and 24, 1995, in Helena, Montana. Petitioner, Edwin Taylor (claimant), was present and represented by Mr. Wade J. Dahood. Mr. Bernard J. Everett was also present on behalf of claimant but did not actively participate in the trial due to a previous order of this Court. Respondent, State Compensation Insurance Fund, was represented by Mr. Oliver H. Goe.

Claimant testified on his own behalf. Elizabeth Larain, Robert Beebe, Carol McKean, Quentin Miller, Bryan Costigan, Lance Zanto, Bill Visser and Bernard Everett also testified. The depositions of Elizabeth Larain, Edwin Taylor (two volumes), Erica Byrd, Dee Dee Derzay, Dan Noyes, Dr. Jim Deming, Dr. John Robbins, Dr. John Diggs, Quentin Miller, Dr. Steven Shaneyfelt, Barb Beukenhorst, Ben Sinnema, Dr. Daniel Gannon, Linda Davis, Phil Davis, Dr. Pamela Hiebert, Bernard Everett, Alan Alsop, Joyce Sather and Skip Tinder were submitted for the Court's consideration. Elizabeth Larain's deposition, which is also marked as exhibit 62, is admitted only for the portions referenced in her examination and cross-examination at trial.

Exhibits: Exhibits 2a-d, 3a-c, 4a-b, 5, 5a-f, 6, 9a-f, 11 through 15, 16a-d, 17a-b, 18 through 20, 22a-b, 23, 24a-c, 30 through 34, 36, 38 through 43, 44a, 44f-k, 46, 51 and 56 were admitted without objections. The objections to exhibits 7, 21, 25a-b, 26, 27 and 54 were withdrawn and those exhibits were admitted. Exhibits 1, 8, 28, 29, 35, 37 with the exception of its bankruptcy and subpoena portions, 44, 44b-c, 44l-m, 45, 45a-e, 46c, 52, 53, 62 and

64 were admitted over objection. Exhibits 47, 47a-d, 48, 49a-c and 57 through 61 were admitted for the limited purpose of showing reasonableness. Exhibit 49a-c were also admitted for the purpose of showing prior inconsistent statements, which were referenced a trial. Exhibits 22c, 44d, 46a-b, 50 and 63 were withdrawn. Exhibit 62 was denied except for portions that were referred to in Larain's testimony at trial. Exhibit 65 was not offered.

The Court reserved its rulings on the admissibility of Exhibits 10, 55 and 66. Exhibit 10 is refused as it is incomplete and in any event included in its entirety in Exhibit 49c, which was admitted for purposes of reasonableness and prior inconsistent statements. Exhibit 55 except pages 19 and 20 is refused as it principally concerns an independent medical condition and is irrelevant. Pages 19 and 20 of the exhibit are admitted since they concern claimant's low-back condition. Finally, Exhibit 66, to which claimant objected, is refused.

The transcript of these proceedings is in three volumes. The transcript of Elizabeth Larain's, Robert Beebe's and Carol McKean's testimony will be referred to as Tr. I. The transcript of claimant's testimony will be Tr. II. The transcript of Lance Zanto's testimony will be cited as Tr. III. The trial testimony of Bernard Everett, Bill Visser, Quentin Miller and Bryan Costigan was not transcribed.

Issues presented: Two Petitions for Hearing are considered herein. The first petition (WCC No. 9406-7066) was filed by claimant and concerns an injury alleged to have occurred on March 4, 1991. The claim was initially accepted but in April 1994 the State Fund repudiated its acceptance, alleging fraud. Claimant seeks reinstatement of his benefits. The second petition (WCC No. 9407-7097) was filed by the State Fund. The State Fund alleges that claims for injuries on March 4, 1991, February 26, 1990 and November 15, 1990, were fraudulent and seeks reimbursement of all benefits paid on those claims. On February 16, 1995, this Court consolidated the two petitions into WCC No. 9406-7066. (Order Consolidating Files.)

Having considered the Pretrial Order, the testimony presented at trial, the demeanor and credibility of the witnesses, the depositions and exhibits, and the parties' briefs and proposed findings of fact and conclusions of law, the Court makes the following:

#### FINDINGS OF FACT

1. At the time of trial claimant was forty-nine years old. (Tr. II at 6.) Claimant has a GED. (*Id.*)
2. In the late 1980's, claimant went to work for the Montana Department of Transportation (DOT), formerly the Montana Highway Department. (Tr. II at 7.)
3. Claimant filed claims for compensation for industrial injuries that allegedly took place on February 26, 1990, November 15, 1990 and March 4, 1991. At the time of the alleged

injuries, the State Fund insured the DOT. It accepted liability for each of the claims and has paid claimant wage loss and medical benefits.

4. Claimant has not worked since March 4, 1991, and he claims that he has been totally disabled since that date. (Tr. II at 6.) He received temporary total disability benefits from March 4, 1991 until April 1994, at which time the State Fund terminated his benefits in the belief that his claim was fraudulent.

5. The Court finds that the credibility of the witnesses testifying at trial is critical to the resolution of this case. I found the witnesses testifying against claimant to be credible. On the other hand, I found the claimant incredible. Indeed, after listening to claimant's testimony, I was firmly persuaded that his claims with respect to alleged injuries on November 15, 1990 and March 4, 1991, were false. In judging claimant's credibility, I have given no weight to deposition testimony regarding claimant's reputation or veracity. My credibility findings are based on trial testimony, my personal observation of claimant, my assessment of the credibility of the other witnesses who testified at trial, claimant's admissions to those other witnesses, claimant's behavior following his alleged injuries, his motive to falsify claims, and his overall conduct.

6. Although this Court has been made aware that a separate criminal proceeding is also pending against claimant, that fact and the documents pertaining to it are not considered in this case. The criminal charges are mere allegations and are not evidence of fraud.

7. Ultimately, as detailed in the following findings, I find that claimant's November 15, 1990 and his March 4, 1991 claims were fraudulent. With respect to the claim regarding an alleged injury on February 26, 1990, I find that the State Fund has failed to carry its burden of proof that this claim was fraudulent.

#### Alleged February 26, 1990 Injury

8. The first of claimant's three claims for compensation is for an alleged industrial accident occurring on February 26, 1990. According to claimant, he was working alone in the shop at the time of this incident. (Tr. II at 113.) He testified that he backed into an open door of a truck that was being repaired. (*Id.* at 114.) He further testified that he hit the door with such a force that it knocked him to the ground. (*Id.* at 115.)

9. Claimant did not report any accident on that date and continued working until March 20, 1990. (*Id.* at 119.)

10. On March 20, 1990, claimant left work on account of chest pains and went to the emergency room of the Bozeman Deaconess Hospital. At the hospital he was examined by Dr. Steven Shaneyfelt, who recorded that claimant had severe and incapacitating substernal and left-sided anterior chest pain. (Ex. 2a.) Claimant was hospitalized at that time.

11. During his hospitalization claimant reported that he also had shoulder pain radiating from the back of his neck. (Ex. 3a.) On March 22, 1990, claimant was examined by Dr. Daniel Gannon, an orthopedic surgeon, who ordered a cervical CT scan. (Ex. 3a.) The scan revealed moderate to severe narrowing of the neural foramina on the left side at the C4-5 level. (Ex. 4b.) Ultimately, claimant was diagnosed as suffering from a ruptured cervical disk. (Ex. 5f.)

12. Only after he learned that he had a significant cervical condition did claimant report an industrial accident to his employer. That report is reflected in an attachment to the Employer's First Report. (Ex. 1.) It reads in part:

Mr. Taylor entered Bozeman Deaconess Hospital during his work shift on 3-20-90 with chest pains. During his stay in the hospital (3-20-90 / 3-24-90) [sic] a cat scan was performed. As a result of the scan, Mr. Taylor was told by Dr. Dan Gannon, orthopedic surgeon, that he had a ruptured disc and compressed fracture of the vertebrae and was advised to have corrective surgery.

Mr. Taylor stated he recalled the incident that caused the injury. While he was sweeping the shop floor, he had bent over and was moving backwards when he raised up and hit his neck and shoulder on the left side, on the front door edge of the wing truck. The doors of this truck were tied in an open position while the truck was being worked on. Mr. Taylor did not report the incident, deciding to just continue working.

Following the Doctor's recommendation for surgery, he advised the DOH of the accident. He has not returned to work as of March 26, 1990.

13. On July 25, 1990, Dr. James Johnson performed an anterior diskectomy and fusion at the C4-5 level. (Exs. 5d and 5f.)

14. The State Fund accepted liability for the February 26, 1990 claim. It paid claimant \$5,591.64 in wage loss benefits and \$17,161.70 in medical benefits.

15. While the circumstances of claimant's report of this injury, taken together with facts found regarding claimant's subsequent two claims, raise a suspicion of fraud with respect to the February 26, 1990 claim, there is insufficient evidence to persuade me that this claim was fraudulent.

#### Alleged November 15, 1990 Injury

16. Claimant filed a claim for an injury that allegedly occurred on November 15, 1990. There were no witnesses to the alleged accident. (Tr. II at 131.)

17. According to claimant, the accident occurred in a maintenance shed: claimant asserts he bumped his head when he was rising up from checking plow bolts. (Tr. II at 131 and Ex. 8.) At trial he testified that he was knocked to his knees and that "possibly" he lost

consciousness for a few seconds. He said that he told his treating physician that he did not know whether he was knocked out or not. (*Id.* at 132.)

18. Claimant further testified that the accident occurred at 3:05 p.m., near the end of his shift. (Tr. II at 130-31) and that within 15 minutes of the accident he reported the incident to his supervisor, Quentin Miller. (Tr. II at 133.) He decided to finish his shift, which ended at 3:30 p.m., and drove himself to the doctor after work.

19. The Employer's First Report states that claimant reported his injury at 12:00. (Ex. 8.)

20. Dr. Pamela Hiebert examined claimant at the Bozeman Deaconess Hospital on the evening of November 15, 1990. (Ex. 9a.) Her medical note on that date states that claimant reported he "was knocked out" but "[h]e doesn't know for how long." (*Id.*) In her deposition, Dr. Hiebert confirmed that claimant reported that he had been knocked out. (Hiebert Dep. at 15-16.) The positive report of loss of consciousness conflicts with claimant's trial testimony.

21. During her November 15, 1990 examination of claimant, Dr. Hiebert noted that he had a tender lump in the left occiput but no depressed skull fracture. (Ex. 9a.) Dr. Hiebert testified that she determined that the lump was tender based on claimant's subjective complaints. (Hiebert Dep. at 34.) She also commented that claimant's lump was not impressive because she did not describe it. (*Id.* at 21.) She opined that claimant's lump was of recent origin but she qualified that opinion by saying that it was based on what claimant told her; she agreed that she really had no idea how long the lump had been there. (*Id.* at 30 and 43.) She stated that although she diagnosed claimant as having a concussion, her diagnosis was based on claimant's report that he had lost consciousness. (*Id.* at 38-39.) Dr. Hiebert hospitalized claimant for observation on account of that report. (*Id.* at 33-4.) Other than the lump, there was no objective evidence of any injury. (*Id.* 21-22, 24.)

22. In her note of November 15, 1990, Dr. Hiebert also wrote that claimant was a difficult historian. (Ex. 9a.) She explained at her deposition that the term "difficult historian" means that she had trouble getting a coherent history from claimant and she did not know if the history was reliable. (Hiebert Dep. at 27.)

23. Claimant was hospitalized overnight and then released. (Ex. 9e.) Dr. Hiebert never saw him again with respect to this incident. (Hiebert Dep. at 23.)

24. Dr. Steven Shaneyfelt, an internist, examined claimant in the hospital on the morning after he was admitted (November 16, 1990). (Shaneyfelt Dep. at 40.) He found a small bruise or hematoma which indicated an initial injury of up to a week previous but more likely "within 48 to 72 hours of coming to the hospital." (*Id.* at 41.)

25. Robert Beebe met claimant in 1980 when he was working for the same trucking firm as Beebe. (Tr. I at 95.) For the next ten years they were mere acquaintances. (*Id.*) However,

commencing in January 1990, claimant and Beebe lived in the same trailer court and became friends. (*Id.* at 95.)

26. Claimant showed Beebe a lump on the left side of his neck three to four days before the alleged workers' compensation accident. (Tr. I at 101.) Beebe described the position of the lump as "on the hard part of the muscle" of the left side of the neck, at the hairline of the head. (*Id.* at 100.) In response to questions by the Court concerning the location of the lump, he pointed to the area where the left neck muscle attaches to the base of the skull, an area which is to the rear of the left ear. That area roughly corresponds to the location described and drawn by Dr. Hiebert. (Hiebert Dep. at 20, 30 and Dep. Ex. 7 and Ex. 9d.) Beebe testified that the lump was "about a half size of an egg length-wise." (Tr. I at 101.) Dr. Hiebert estimated the size as between one to three or four inches. (Hiebert Dep. at 20, 30 and Dep. Ex. 7; Ex. 9d). Beebe's estimate was within those parameters.

27. Beebe drove claimant to the hospital on the evening of November 15, 1990. Before entering the emergency room of the hospital, claimant told Beebe, "Don't tell nobody, but I'm going to turn this in as an industrial accident." (Tr. I at 102.)

28. Claimant did not deny that he showed Beebe something on his neck shortly before November 15, 1990. However, at trial he explained it away by saying that a day or two before his hospitalization on November 15, 1990, he had asked Beebe to look at a "pimple" on his neck. (Tr. II at 135.) He further testified that it was not the "big lump" that Dr. Hiebert examined and that Beebe looked at it and said, "I think it's a pimple." (*Id.*)

29. I find claimant's "pimple" explanation unconvincing. Claimant was not credible, whereas Beebe was. I find that the lump on claimant antedated claimant's alleged industrial accident of November 15, 1990, and that claimant's report of an industrial accident was fabricated and false.

30. The State Fund paid medical benefits in the amount of \$274.47 with respect to the alleged industrial accident of November 15, 1990.

#### Alleged March 4, 1991 Injury

31. On March 14, 1991, claimant filed a claim for compensation regarding an unwitnessed injury that allegedly occurred on March 4, 1991. (Ex. 11.)

The "Employer's First Report of Notice" for this incident reads:

Employee was picking up cones on Main St. He had tar and gravel stuck to the bottom of his boots, he stumbled because of the buildup on his boots. He had 5 cones in his hands he was carrying. He fell into the fender on the air compressor hitting his head, neck, and shoulder then fell to the pavement landing on his hips and back.

(Ex. 11.) In submitting this claim, claimant represented that the information was accurate. (*Id.*) At trial his description of the incident was similar to the description set forth in the Employer's First Report. (Tr. II at 101-3.)

32. At 3:45 p.m., March 4, 1991, claimant sought care at the emergency room of the Bozeman Deaconess Hospital. (Ex. 12 at 2.) He was initially seen by Dr. Thomas Hildner. (Exs. 12 at 2 and 42 at 2.) The ER record states that claimant was tender over the left occipital area, the left shoulder. Hildner also noted a "contusion" on the left side of the head. (Exs. 12 at 2 and 42 at 2.) However, in a letter of February 3, 1994, Dr. Hildner clarified his note, stating that he did not see any hematoma, abrasion or bruising on claimant. (Ex. 42 at 1.) His letter indicates that his note of a "contusion" may have indicated nothing more than tenderness:

This is in response to your letter of 1/18/94 regarding a patient that I saw in the emergency room on 3/04/91. My diagnosis was that the patient did have, in fact, a contusion to the left side of the head. This is manifested by history and tenderness in the left occipital area. There are varying types of contusions, some of them result in obvious scalp hematoma, some of them occur over a larger diffuse area and no hematoma response is elicited. I did not see any significant abrasion or bruising, but again, that would merely be a skin manifestation and is not always present in response to a contusion. The contusion may have been mild, therefore causing no obvious signs of injury. I hope this information is helpful.

33. Claimant was admitted to the hospital under the care of Dr. John Robbins, who examined claimant on the evening of March 4, 1991. Claimant reported to Dr. Robbins that he could "not recall whether or not he experienced any loss of consciousness." (Ex. 12 at 3.) In contrast, the registered nurse who took a history from claimant upon his arrival at the ER noted that claimant "denies LOC [loss of consciousness]." (*Id.* at 2.)

34. At the time of Dr. Robbins' examination, claimant was complaining of "pain in his occiput, left shoulder and left hip." (Ex. 12 at 3.) Dr. Robbins' examination of claimant's head "revealed no obvious hematoma or abrasion." (*Id.*) At his deposition, Dr. Robbins testified that there was no evidence of any trauma to the head:

Q. But your examination of the head was normal in all respects?

A. Correct

Q. No objective evidence of any trauma to the head at all during your examination?

A. Not at the time of my examination.

(Robbins Dep. at 17-18.) In examining claimant, the only possible objective finding by Dr. Robbins was "give-away" weakness of the left arm. (*Id.* at 18.) However, Dr. Robbins characterized this finding as having a subjective element. Noting that the test involved

asking the claimant to resist during motor testing; claimant initially resisted but then gave way. (*Id.*). Discussing the test, he said: "That is the only thing I see in my records that would qualify as *possibly* objective findings. But, again, that's subjective interpretation that can be difficult to quantify." (*Id.*; italics added.) Dr. Robbins admitted claimant for observation on account of the history provided by claimant, including claimant's statement that he may have lost consciousness. (Ex. 12 at 3; Robbins Dep. at 17-22.)

35. X-rays of claimant's shoulder and cervical and lumbar spine were taken on March 5, 1991. (Ex. 12 at 11-12.) The lumbar x-rays disclosed mild degenerative disc disease at L4-5 and L5-S1, early degenerative spurring, and mild to moderate hypertrophic degenerative joint disease involving the facet joints from L3-4 through L5-S1 bilaterally. (*Id.*) The shoulder x-ray was normal. (*Id.*) The cervical x-rays disclosed mild narrowing of the right and left neural foramen at C4-5, secondary to bony hypertrophy, degenerative spurring anteriorly at the C3-4 level and the antero-inferior corners of C5 and C6, and a stable cervical fusion. (*Id.*) None of these findings prove that an injury on March 4, 1991 occurred.

36. Claimant was discharged from the hospital on March 8, 1991. (Ex. 12 at 1.) However, he resisted the discharge. (*Id.*) Dr. Steven Shaneyfelt, one of Dr. Robbins' partners, ordered the discharge and wrote in his discharge summary, "He [claimant] resisted hospital discharge but I impressed on the patient the need to return to previous level of function." In his deposition he explained:

A. The implication there is I think he was basically laying in bed wanting people to wait on him and I wanted him to get out of bed and get going. "You need to start taking care of yourself."

(Shaneyfelt Dep. at 59.)

37. Dr. Shaneyfelt was unable to relate objective lumbar findings to claimant's alleged injury of March 4, 1991. (Shaneyfelt Dep. at 54.) He agreed that the only evidence that an injury occurred on March 4, 1991, was claimant's reports of pain. (*Id.* at 59-60.)

38. On March 10, 1991, claimant returned to the hospital and was readmitted because he claimed he could not take care of himself. (Ex. 33 at 23.) Claimant's primary complaint was his low-back pain. On March 4, 1991, claimant was complaining of left hip pain, but on March 11, 1991, he was complaining of right hip pain. (Robbins Dep. at 41.)

39 Dr. Robbins was again involved in claimant's care and saw claimant on March 11, 1991. At that time he noted that claimant was complaining of persistent low-back and neck pain. (Robbins Dep. at 30.) Dr. Robbins "was concerned that there may be a possible functional overlay accounting for his [claimant's] ongoing symptoms." (*Id.*) Dr. Robbins defined "functional overlay" as a magnification of symptoms due to an underlying psychological condition. (Robbins Dep. at 42, 47.) It was his opinion that claimant's ongoing symptoms "could possibly have been related to the fall" but that they "could have also reflected a

chronic ongoing process of a variety of causes, including arthritis, discogenic disease or facet syndrome . . . ." (*Id.* at 38-40.) With respect to the industrial accident, he said, "Based **exclusively on Mr. Taylor's history**, yes, I would say his symptoms could be accounted for by his fall." (*Id.*; emphasis added.)

40. During his second hospitalization, Dr. J.V. Matthews, an orthopedic surgeon, saw claimant in a consultation. His impression was as follows:

1. Chronic pain personality.
2. Resolving alcoholic behavior.
3. Lumbar strain superimposed on chronic discogenic disease, no neurologic deficit.
4. Status post C4-5 cervical spinal fusion with no specific neurologic deficit.

(Ex. 12 at 14.) He recommended that "patient be encouraged and reinforced to return to productive work force." (*Id.*)

41. Dr. Shaneyfelt, who apparently was claimant's primary physician during this hospital stay, requested the consultation by Dr. Matthews. Dr. Shaneyfelt commented that Dr. Matthews' report disclosed no objective neurological or other abnormalities, only subjective complaints of pain. (Shaneyfelt Dep. at 62.) He testified that he "was not overwhelmed by his [claimant's] physical complaints and felt that he needed to get going and get back on track." (*Id.* at 63.) Dr. Shaneyfelt also considered claimant's subjective complaints out of line with the objective findings. (*Id.*)

42. On March 13, 1991, while still hospitalized, claimant was also treated by Dr. Duane Mohr, an anesthesiologist. Dr. Mohr injected a local anesthetic in the area of the facet joints of the L4-5 and L5-S1. (Ex. 29 at 69-70.) Claimant reported a "considerable decrease in pain and felt like he could move his back with less stiffness and pain." (*Id.* at 70.) Two months later claimant told Dr. John S. Diggs that Dr. Mohr's injection "was uncomfortable and has not relieved the [claimant's] chronic low back pain." (Ex. 15 at 1.)

43. Claimant was discharged from the hospital on March 15, 1991. (Ex. 12 at 18.)

44. Claimant was hospitalized for a third time on March 24, 1991, for an alleged suicide attempt. He presented at the hospital with a blood alcohol level of .198 and said that he had also taken 40 to 50 Flexeril 10 milligram tablets. (Ex. 12 at 40, 43; Shaneyfelt Dep. at 67.) During this hospitalization claimant was told by Dr. Jim Deming, a psychologist, that his three hospitalizations in approximately 30 days probably represented a misuse of the facility and that a screening procedure would be established to review future hospitalizations. (Ex. 29 at 22.) Claimant was discharged on March 26, 1991. (Ex. 12 at 40, 43.)

45. When asked in his deposition about the three hospitalizations, Dr. Shaneyfelt commented:

A. Three hospitalizations in one month is a lot of hospitalizations. Reading through everything and any additional memory I have is that I felt that Mr. Taylor's problems were more psychologic than physical at the time.

(Shaneyfelt Dep. at 71.)

46. Claimant thereafter sought care from Dr. John S. Diggs, who specializes in occupational medicine and pain management. He first saw Dr. Diggs on May 14, 1991. At that time claimant was continuing to complain of neck and low-back pain. (Ex. 15 at 2.) Dr. Diggs characterized claimant as "anxious" and as expressing "frustration" but observed that he was "in no acute physical distress." (*Id.*) Upon palpitation, claimant showed "hypersensitivity" in the neck and the right trapezius muscle and "tenderness over a general area in the L/S spine." (*Id.*) Claimant's reactions to various tests done by Dr. Diggs were strongly indicative of symptom magnification and overreaction. (Diggs Dep. at 6-13, 18-20.) The exam was otherwise unremarkable. Dr. Diggs summarized his assessment as follows:

History of low back strain with chronic pain complaints in a patient who is neurologically intact. There is no evidence for an active inflammatory problem or radiculopathy. **The patient has some significant pain behavior and disease conviction.**

(*Id.* at 2; emphasis added.) He further noted "multiple stress factors in his [claimant's] life" and that claimant was "not ready to benefit from a course of PT [physical therapy]." (*Id.*)

47. Over the course of Dr. Diggs' treatment, claimant continued to complain of severe pain and disability. (Ex. 15.) Claimant was provided with a trial course of physical therapy but showed no significant improvement. (Ex. 15 at 14.) On July 19, 1991, Dr. Diggs determined that claimant had reached maximum medical improvement but that he should not return to manual labor. (*Id.*) He recommended no further treatment. (*Id.* at 15.)

48. Dr. Diggs could not identify a physical basis for claimant's pain complaints (Diggs Dep. at 63) or any objective evidence that he suffered an injury. (*Id.* at 86.) In Dr. Diggs' opinion there is nothing "physically preventing" claimant from returning to his time-of-injury job. (*Id.* at 89.) Ultimately, Dr. Diggs was unable to account for claimant's complaints. (*Id.* at 93.)

49. Dr. See performed nerve conduction studies of claimant in August of 1991. (Ex. 36 at 1258.) He recorded, "Normal EMG and nerve conduction studies in regard to the low back and lower extremities." (*Id.*)

50. On August 27, 1991, claimant underwent a water soluble myelogram, which was unremarkable. (Ex. 16a and Ex. 20a at 2.)

51. Claimant saw Dr. Snyder on August 29, 1991. Dr. Snyder reviewed an MRI, which he interpreted as showing degenerative changes at the L4-5 with some bulging at the L4 and L5, but concluded that the bulging was not causing his symptoms. (Ex. 41.) He further noted, "The patient has some nonorganic findings and in general I don't feel that his symptoms altogether fit a logical and reproducible pattern." (*Id.* at 2.) He observed, "I am not sure that with our current studies we have a current handle on where his back pain is coming from." (*Id.*)

52. Claimant was seen by Dr. Maurice Smith in October 1991. In his report of October 7, 1991, Dr. Smith wrote that "in taking a history from the patient I note that he is very illusive as to the type of pain." He concluded that while the degenerative discs at L4-5 and L5-S1 may be a source of pain and "probably enough to suggest that he not continue heavy labor as he has in the past", he did not "think they in **anyway** explain the symptomatology which he has." (Ex. 40 at 3 and see Ex. 41, emphasis added.) He also noted claimant's pain responses and his pain diagram were abnormal. (Ex. 40 at 3.)

53. To support his claim of an injury on March 4, 1991, claimant relies on the reports and records of Dr. Weinert and medical panel report by Dr. Norman, which assign claimant a permanent impairment related to the low back. Dr. Weinert arrived at a 14% permanent lumbar impairment of the whole person. (Ex. 7 at 4.) Dr. Norman's panel, which met on June 27, 1991, found a 10% permanent impairment related to lumbar spine. (Ex. 21.) Claimant had a prior history of back pain on account of an industrial accident he suffered in 1979 (Ex. 42L) and was determined to be partially disabled on account of that injury (Ex. 35 at 1145-46.) Moreover, the ratings do not prove that he suffered an injury on March 4, 1991 or explain the discrepancies between claimant's complaints and his physical findings.

54. Aside from significant questions raised by the medical information, there is other evidence which, taken together, compels a conclusion that no injury or accident occurred on March 4, 1991.

55. Dr. Jim Deming provided psychological counseling and treatment to claimant between April 1990 and September 1991. (Ex. 30.) Dr. Deming declined to say that claimant was "exaggerating" his pain but said, "I believe that, while I'm uncomfortable with the word "exaggerate," I believe that his pain disorder was less severe than he reported." (Deming Dep. at 49.)

56. At the time of the alleged accident, claimant was unhappy with his job and knew that he was at risk of being terminated.

a. On January 19, 1991, claimant was placed on probation for 30 days. (Tr. II at 63-64; Miller Trial Testimony)

- b. In an attempt to improve claimant's job performance, claimant was given special instructions on January 21 and 22. ( Tr. II at 64-65; Miller Trial Testimony.)
- c. Claimant was involved in a "preventable accident" on January 28, 1991. (Tr. II at 65-66; Miller Trial Testimony.)
- d. On February 13, 1991, claimant was given a letter of reprimand which warned him that any further job deficiencies could result in suspension, demotion or termination. (Ex. 44b at 5; Tr. II at 69-70; Miller Trial Testimony.)
- e. On March 2, 1991, two days prior to the alleged accident, claimant was arrested and charged with driving under the influence of alcohol and theft. (Tr. II at 76 and 81.) Claimant was aware that a DUI conviction could result in loss of his license. (Taylor Dep. at 64.) He also knew that he had to have a driver's license to work for the DOT. (*Id.* at 65.)
- f. In his deposition claimant described his job with the DOT as his "dream job" (Taylor Dep. at 46) and said he "had absolutely no intention of ever leaving that job" (*Id.* at 45). He refused to admit that he was having problems on the job or that it was in jeopardy. (*Id.* at 45-6.) However, Dr. Deming's office note for January 9, 1991, states, "PT AGAIN HAVING TROUBLE ADJUSTING TO THE JOB. HE FEELS THAT SUPERVISORY PERSONNEL ARE HARASSING HIM." (Ex. 30 at 986A; capitalization in original.) Deming's notes for January 31 and February 7, 1991 reflect that claimant reported he was being harassed by his superiors at work. (*Id.*) The note of February 17, 1991, reflects Dr. Deming's opinion that claimant will continue to require "assistance in handling readjustment to the work site"; that the environment at the work site was "detrimental to a satisfactory adjustment and job reentry" and that under "current stress level" the claimant's **"return to unemployment is likely."** (*Id.*; emphasis added.)

57. At the time of the alleged March 4, 1991 injury, claimant was experiencing financial difficulties. (Tr. II at 73.) His wages were being attached by creditors, the IRS had filed a Notice of Levy in attempt to collect unpaid taxes, and he owed the State of Montana for unpaid taxes. (*Id.* at 74-75.) On March 25, 1991, Dr. Deming reported that claimant was "in severe financial straits." (Ex. 30 at 987.) On another occasion claimant told Deming that "his Work Comp payments could not be garnished through any agency." (Deming Dep. at 46.) Deming went on to say that claimant "felt that [workers' compensation benefits] was the way for him to get his bills paid." (*Id.*) Claimant also told Deming "that the only way that I'm able to pay my bills is through the Work Comp payments that cannot be restricted by agencies that would get bills paid." (*Id.* at 48.)

58. Quentin Miller, claimant's supervisor on March 4, 1991, testified concerning a prior incident involving claimant. (Trial Testimony.) Miller was crushing ground with a metal bar and claimant was working with his hands removing the broken-up ground. At one point

Miller accidentally almost struck claimant's hands because they were in the way. Miller warned, "Watch it Ed." Claimant replied, "It pays well." (*Id.*)

59. Shortly after his hospitalization of March 4, 1991, claimant told Carol McKean, his ex-wife, that he had been injured at work. (Tr. I at 163-64.) He specifically discussed workers' compensation, telling her "he was buying time because he had all these creditors after him and his workmen's comp money couldn't be touched by creditors." (*Id.* at 164.)

60. Claimant told different versions of how the accident occurred.

a. Claimant told his ex-wife, Carol McKean, that he had injured his back operating a jack hammer. (Tr. I at 164.) He did not mention road cones or slipping and falling.

b. He told Elizabeth Larain, a former friend, that he had tripped over some road cones and fallen into a pot hole. (Tr. I at 9.)

c. He told Robert Beebe that he had slipped on road oil and fallen. (Tr. I at 104.)

61. At trial the claimant was asked whether he had any bruises, contusions or scrapes when he went to the hospital on March 4th. He responded:

**A.** I'm sure I did, yes.

**Q.** Where?

**A.** Left side of my body, I think my arm, my shoulder. I think there was a pretty good nick on the side of my head or maybe in my jaw area. I don't remember. You should have asked me asked me these questions three years ago.

**Q.** Your recollection right now is you had abrasions and scrapes and --

**A.** I had some scratches and stuff, yes. Again, I don't remember exactly.

(Tr. 2 at 112.) The medical records fail to reflect any cuts, abrasions, scrapes or similar signs of obvious injury. To the contrary, other than the professed tenderness expressed by claimant, the doctors failed to detect any sign of obvious injury. Claimant's testimony didn't ring true.

62. Claimant admitted to Larain that he had faked his March 4, 1991 injury and was scamming the system. Larain testified as follows:

**Q.** Did he tell you that he faked the injury?

**A.** Yes.

**Q.** Did he tell you how he went about faking the injury?

**A.** What I remember him telling me is that he told the other coworkers to go ahead and go back to the shop and he would finish picking up the road cones, and then that's when it took place, when they had all gone back to the shop.

**Q.** When you say that took place you mean when he faked the injury?

**A.** Right.

**Q.** Did he tell you that he was scamming the system?

**A.** Yes, he did. Those were his words.

...

**Q.** What did he say about scamming the system and why he was doing it?

**A.** Because he already had a claim with workmen's comp for a cervical fusion and he would get a larger settlement from that.

**Q.** When you say he would get a larger settlement from that, what do you mean by that?

**A.** With his workmen's comp claim.

**Q.** Did he make any statements regarding taking the system for what it's worth or something along those lines?

**A.** I believe those were his words.

(Tr. I at 17-18.) Claimant called Larain later and told her that the doctors had found an abnormality in his CT scan, which he sounded quite happy about. (*Id.* at 21.) I specifically find that Larain's testimony was credible. I do so despite her having signed an affidavit which essentially contradicts her trial testimony. (Ex. 25b.) The affidavit is inconsistent with what she had previously reported and it was prepared by counsel for the claimant after he had talked to her by telephone. Larain's explanation that she signed the affidavit because she felt intimidated by claimant's counsel and did not want to have to testify at trial was credible.

63. On the day of the alleged industrial accident, claimant's supervisor, Quentin Miller, observed that claimant was acting strangely. (Miller Trial Testimony.) Claimant avoided Miller and was very quiet. (*Id.*)

64. Following his alleged injury, claimant told medical providers that he was in such pain that he could not take care of himself. On March 12, 1991, he advised Dr. Matthews that he was in such pain that he could not wash dishes, cook or care for himself. (Ex. 29 at 67.) Three months later, on June 24, 1991, claimant, "complains of increased pain trying to walk, and is still limited to only a few blocks. Attempting to wash dishes, make beds, and routine housework chores causes increased discomfort." (Ex. 31 at 1058.) But in April of

1991, claimant spent approximately four hours under his car removing bolts and replacing part of the differential. (Tr. II at 9-13, 53, 107-110; Tr. I at 104-8.) Robert Beebe, who observed and assisted claimant, testified that claimant lifted a cover plate weighing between 70 and 80 pounds. (Tr. I at 107 and 122.) Dr. Diggs stated that such activity would be inconsistent with what claimant was telling him he could do. (Diggs Dep. at 38-39.)

65. The State Fund paid claimant temporary total benefits of \$36,483.35 and \$18,605.03 in medical benefits with respect to his March 4, 1991 claim.

66. The State Fund had good grounds for terminating claimant's benefits on April 6, 1994.

### CONCLUSIONS OF LAW

1. This case involves the question of fraud. The State Fund contends that all of claimant's claims for alleged injuries; February 26, 1990, November 15, 1990 and March 4, 1991, were fraudulent. Fraud can never be presumed but must be proven by a preponderance of the evidence. *Batten v. Watts Cycle & Marine*, 240 Mont. 113, 117, 783 P.2d 378 (1989) (citing *Wright v. Blevins*, 217 Mont. 439, 705 P.2d 113 (1985)). A mere suspicion of fraud is not sufficient. (*Id.*)

Claimant argues that the State Fund must prove fraud by clear and convincing evidence, citing section 27-1-221, MCA. However, the cited statute sets out the burden of proof of fraud for purposes of establishing punitive damages. The State Fund is not seeking punitive damages in this case. Claimant also cites to Justice Trieweiler's dissent in *Blythe*. That case is inapplicable to the case before this Court because it does not address fraud. Thus, the applicable standard of proof is by a preponderance of the evidence.

However, the standard of proof is not dispositive in this case since I find that the evidence of claimant's fraud with respect to his November 15, 1990 and March 4, 1991 claims is clear and convincing. "Clear and convincing" means proof which is by "more than a preponderance of evidence but less than beyond a reasonable doubt." Section 27-1-221(5), MCA. It means "evidence in which there is no serious or substantial doubt about the correctness of the conclusions drawn from the evidence." MPI 25.61. In this case I find that claimant's fraud has been proven beyond any mere preponderance of evidence. After listening to the witnesses at trial and reviewing all submitted depositions and exhibits, I reached a strong and firm conviction that claimant was not telling the truth at trial and that he falsified the two claims. I have no serious or substantial doubt about the correctness of my conclusions.

3. Actual fraud is alleged in this case. The State Fund must prove the following nine elements:

(1) A representation;

(2) Falsity of the representation;

- (3) Materiality of the representation;
- (4) Speaker's knowledge of the falsity of the representation or ignorance of its truth;
- (5) Speaker's intent it should be relied upon;
- (6) The hearer's ignorance of the falsity of the representation;
- (7) The hearer's reliance on the representation;
- (8) The hearer's right to rely on the representation;
- (9) Consequent and proximate injury caused by the reliance on the representation.

*Lee v. Armstrong*, 244 Mont. 289, 293, 798 P.2d 84 (1990). The State Fund has proved each of the nine elements and satisfied its burden of proof with respect to the November 15, 1990 and March 4, 1991 claims.

The November 15, 1990 and March 4, 1991 alleged accidents were unwitnessed. Claimant made specific statements acknowledging that the two claims were fraudulent. While it is ultimately his word against the words of Larain and Beebe, I found the latter witnesses credible and believable. Ultimately, however, this case doesn't rely solely on their evidence. The finding of fraud is supported by other significant evidence.

The evidence presented in this case establishes at the time of the claims of November 15, 1990 claim and especially the second claim in March 4, 1991, claimant was in financial straits. Creditors were pursuing him, his wages were garnished, and two different taxing authorities were after him. At the same time, he had become unhappy with his job and angry with his supervisors, whom he felt were harassing him. At the time of the March 4 claim, he had been recently reprimanded over two incidents. He had been threatened with suspension or termination in the event of future incidents. And, just two days prior to the March 4 claim, he had been arrested for DUI, putting his driver's license and job in jeopardy. He saw workers' compensation as a solution to his problems.

My judgment concerning the credibility of the witnesses in this case is critical to my final determination. Claimant made as great a negative impression on me as any witness I have observed during the last two years. Listening to him and observing him, I simply did not believe him and concluded that he was perpetuating a fraudulent scheme.

Significantly, claimant testified about cuts and scratches he had when he went to the hospital on March 4th, even mentioning a "pretty good nick on the side of my head or maybe in my jaw area." (Tr. II at 112.) His complaints of hip pain changed from the left side on March 4, to the right side on March 11th. He insisted on hospitalization and claimed he could not perform ordinary tasks of daily living. Yet, the medical records and testimony of the physicians who examined him show that they did not see any objective evidence of any injury.

To enhance his claim, the claimant has fabricated and exaggerated many of his symptoms. His physicians have been unable to find any objective basis for many of his symptoms. Some are anatomically inappropriate. According to Dr. Diggs, he tested positive on five out of six of Waddel's tests for exaggeration. He exaggerated his inability to do daily tasks.

Claimant undoubtedly has low-back problems dating back to 1979. He has degenerative changes in his back and may suffer some pain. But the existence of back trouble does not prove that he was injured on March 4th.

4. I am unpersuaded that the February 26, 1990 claim, was fraudulent. Claimant made no specific admissions concerning that claim. Also lacking is the corroboration present with respect to the other two claims.

5. An insurer may file a civil action for fraud against a claimant to recover benefits paid to a claimant. *State Fund v. Chapman*, 267 Mont. 484, 491, 885 P.2d 407 (1994). Since the November 15, 1990 and March 4, 1991 claims were fraudulent, the claimant is liable to repay the State Fund for the medical and compensation benefits paid to him on account of those claims.

6. Claimant is not entitled to a reinstatement of benefits respecting the May 4, 1991 claim.

7. The State Funds actions in this matter were not unreasonable and claimant is not entitled to attorney fees, costs or a penalty.

#### JUDGMENT

1. Claimant's claims for November 15, 1990 and March 4, 1991 injuries were fraudulent.

2. Judgment in the sum of \$55,362.85 is entered in favor of the State Compensation Insurance Fund and against the claimant, Edwin A. Taylor.

3. The State Fund has no further obligation to pay benefits to claimant on account of his alleged November of 1990 and March of 1991 injuries.

4. This JUDGMENT is certified as final for purposes of appeal pursuant to ARM 24.5.348.

5. 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 21st day of August, 1995.

(SEAL)

/s/ Mike McCarter

JUDGE

c: Mr. Wade J. Dahood  
Mr. Oliver H. Goe