

IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

2010 MTWCC 8

WCC No. 2009-2275

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CHRISTOPHER HART

Petitioner

vs.

HARTFORD INSURANCE COMPANY OF THE MIDWEST

Respondent/Insurer.

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*Appealed to the Supreme Court May 7, 2010  
Remanded to the WCC for further proceedings August 24, 2010*

FINDINGS OF FACT, CONCLUSIONS OF LAW AND JUDGMENT

**Summary:** Petitioner petitioned the Court for certain periods and amounts of temporary total, temporary partial, and back-owing medical benefits. Petitioner injured his low back in the course and scope of his employment. Petitioner's employer provided him with light-duty employment, but Petitioner missed several days of work. Petitioner's relationship with his initial treating physician was terminated due to Petitioner's drug-seeking behavior. A new physician examined Petitioner at Respondent's request. This physician concluded that Petitioner was at MMI and assigned him a 0% impairment rating. Petitioner continued to seek medical care through several physicians, often seeking narcotic medication. Petitioner failed to seek pre-authorization for any of his medical treatment at issue in this case.

**Held:** Petitioner is not entitled to any retroactive temporary total disability benefits because his employer offered him job duties within his restrictions and no physician removed him from work entirely. Petitioner is entitled to retroactive temporary partial disability benefits effective December 30, 2008, when he was restricted to 5 hours maximum with the possibility of not being able to work at all on some days. Petitioner is not entitled to past medical benefits because his personal conduct and broken contracts leave little room for a determination that the treatment bills at issue were for undisputedly necessary treatment.

## Topics:

**Benefits: Temporary Total Disability Benefits.** Where Petitioner's only work restriction was light-duty, no physician removed him from work entirely, and Petitioner's employer provided him with a light-duty job where he was never asked to exceed his restrictions, the Court held that Petitioner was not entitled to TTD benefits.

**Benefits: Temporary Partial Disability Benefits.** Where Petitioner was restricted to light duty until December 30, 2008, at which time a physicians' assistant restricted Petitioner's work day to 5 hours maximum with the possibility that he might not be able to work at all on some days, and Petitioner submitted documentation that he suffered a wage loss, the Court concluded Petitioner was entitled to TPD benefits effective the date of the PA's restriction.

**Constitutions, Statutes, Regulations, and Rules: Montana Code Annotated: 39-71-1101.** Undisputedly necessary medical treatment arising from a work-related injury is compensable irrespective of prior authorization. Where some medical bills have no corresponding medical records which would allow the court to assess the necessity of medical treatment and Petitioner's behavior includes drug seeking and misrepresentations to physicians, it is impossible for the Court to decipher what bills remain unpaid that would fall into the category of undisputedly necessary.

**Benefits: Medical Benefits: Liability.** Undisputedly necessary medical treatment arising from a work-related injury is compensable irrespective of prior authorization. Where some medical bills have no corresponding medical records which would allow the court to assess the necessity of medical treatment and Petitioner's behavior includes drug seeking and misrepresentations to physicians, it is impossible for the Court to decipher what bills remain unpaid that would fall into the category of undisputedly necessary.

**Physicians: Treatment: Preauthorization.** Undisputedly necessary medical treatment arising from a work-related injury is compensable irrespective of prior authorization. Where some medical bills have no corresponding medical records which would allow the court to assess the necessity of medical treatment and Petitioner's behavior includes drug seeking and misrepresentations to physicians, it is impossible for the

Court to decipher what bills remain unpaid that would fall into the category of undisputedly necessary.

¶1 The trial in this matter was held on August 31, 2009, in Great Falls, Montana. Petitioner Christopher Hart (Hart) was present and represented by Richard J. Martin. Respondent Hartford Insurance Company of the Midwest (Hartford) was represented by William O. Bronson.

¶2 Exhibits: Exhibits 1 through 42 were admitted without objection.

¶3 Witnesses and Depositions: The deposition of Hart was taken and submitted to the Court. Hart, Linda Slavik, and Rebecca Jackson were sworn and testified at trial.

¶4 Issues Presented: The Pretrial Order identifies the following contested issues of law:<sup>1</sup>

¶4a Whether Hart is entitled to retroactive temporary total and temporary partial disability benefits.

¶4b What periods and what amounts of temporary total disability and temporary partial disability benefits are owing and/or past due .

¶4c Whether Hart is entitled to retroactive and ongoing medical and wage-loss benefits.

¶4d Whether the Court should award attorney fees, etc.

#### FINDINGS OF FACT

¶5 Unless otherwise noted below, I found the testimony of the witnesses at trial to be credible.

¶6 HCR, Inc. manufactures warehouse freezer doors in Lewistown, Montana. Prior to Hart's injury, he worked at HCR as a door fabricator for approximately 20 years.

¶7 Hart was injured on September 29, 2006, when he leaned back in an office chair and the chair overturned. Mark Warren, Hart's foreman at HCR, drove Hart to the hospital.<sup>2</sup>

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<sup>1</sup> Pretrial Order at 2; Trial Test.

¶8 Brian Priest, M.D., was the emergency room (ER) attending physician at Central Montana Medical Center on the day of Hart's injury.<sup>3</sup> Dr. Priest examined Hart and ordered an x-ray of Hart's pelvis and coccyx. W. Allen Hill, M.D., read Hart's radiograph and determined that Hart's sacrum and coccyx were negative for any radiograph indications. Dr. Hill suspected that Hart suffered from malalignment at L5-S1.<sup>4</sup> Dr. Priest instructed Hart to rest and to use a rubber donut to sit on for a few days. Dr. Priest prescribed Percocet to treat Hart's pain.<sup>5</sup>

¶9 Hartford accepted liability for Hart's industrial injury.<sup>6</sup>

¶10 By December 2006, HCR had offered Hart a drafting position. Hart accepted and was able to do the drafting work.<sup>7</sup> Hart testified that no physician informed him that he could not perform the duties of a draftsman.<sup>8</sup> Hart also testified that HCR did not request that he work beyond his restrictions.

¶11 On October 2, 2006, Thomas Troop, M.D., of Troop Family Medicine, examined Hart.<sup>9</sup> Dr. Troop diagnosed Hart with a back contusion. Dr. Troop prescribed Percocet for Hart's pain.<sup>10</sup>

¶12 On October 11, 2006, V. Anne Hingle, M.D., performed a nuclear bone scan and lumbosacral spine series on Hart. The nuclear bone scan showed increased activity in Hart's mid-sacrum and inferior aspect of both sacroiliac joints consistent with a fracture. Dr. Hingle reported that the lumbosacral spine series demonstrated that Hart had bilateral spondylolysis at L5.<sup>11</sup>

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<sup>2</sup> Trial Test.

<sup>3</sup> Ex. 9 at 1.

<sup>4</sup> Ex. 9 at 7.

<sup>5</sup> Ex. 9 at 5.

<sup>6</sup> Pretrial Order at 1.

<sup>7</sup> Trial Test.

<sup>8</sup> *Id.*

<sup>9</sup> Ex. 41 at 1.

<sup>10</sup> Ex. 41 at 2.

<sup>11</sup> Ex. 9 at 10.

¶13 Hart sought a refill of Percocet at Central Montana Medical Center on October 22, 2006.<sup>12</sup> Dann Harbour, M.D., was the attending physician on call.<sup>13</sup> Dr. Harbour examined Hart and ordered a Toradal injection.<sup>14</sup> Hart was given another prescription for Percocet and discharged.<sup>15</sup>

¶14 On October 20, 2006, Dr. Troop recommended that Hart follow up with an orthopedic evaluation.<sup>16</sup>

¶15 On October 27, 2006, William M. Iannacone, M.D., Ph.D., of Orthopedics of Central Montana, PC, evaluated Hart.<sup>17</sup> Dr. Iannacone assessed Hart with a nondisplaced fracture of the sacrum. Dr. Iannacone restricted Hart's work to no lifting for four weeks and prescribed Percocet. Because of Hart's previous narcotic abuse history while treating with his office, Dr. Iannacone informed Hart that if he attempted to find additional narcotic outside of his office, Dr. Iannacone would discontinue treating him.<sup>18</sup>

¶16 Dr. Troop saw Hart on October 31, 2006. Dr. Troop noted in his treatment notes that he had prescribed 42 Percocet pills to Hart eight days before this appointment which should have been enough for six days. Dr. Troop noted that Dr. Iannacone's office notified him that Hart received 42 Percocet pills from Dr. Iannacone on October 27, 2006. Hart did not notify Dr. Troop of this fact. Dr. Troop refused to renew Hart's narcotic prescription.<sup>19</sup>

¶17 On November 2, 2006, Dr. Iannacone called Linda Slavik (Slavik), Hartford's claims adjuster, and advised her that he would no longer treat Hart because of Hart's repeated phone calls to Dr. Iannacone's office seeking pain medication. Dr. Iannacone also informed Slavik that he was releasing Hart to light duty.<sup>20</sup>

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<sup>12</sup> Ex. 9 at 14.

<sup>13</sup> Ex. 9 at 11.

<sup>14</sup> Ex. 9 at 14.

<sup>15</sup> Ex. 9 at 17.

<sup>16</sup> Ex. 41 at 11.

<sup>17</sup> Ex. 7 at 1.

<sup>18</sup> Ex. 7 at 2.

<sup>19</sup> Ex. 41 at 12-13.

<sup>20</sup> Ex. 39 at 10.

¶18 Hart presented to the ER at Benefis Healthcare in Great Falls, Montana, on November 3, 2006. Jason Gleason, FNP, examined Hart. FNP Gleason reported that Hart came to Great Falls seeking a refill of oxycodone. Hart told FNP Gleason that the medical center in Lewistown was closed “because everyone went hunting.” Hart informed FNP Gleason that Dr. Troop had refilled his oxycodone approximately 10 days ago, but Hart had run out of the medication. FNP Gleason gave Hart a dose of Norflex and Toradol while he was in the ER. Prior to discharge, FNP Gleason prescribed Hart Ibuprofen. FNP Gleason also called the ER in Lewistown and confirmed that it was in fact open and available for Hart’s use on that day.<sup>21</sup>

¶19 On November 5, 2006, Hart sought treatment for his back pain at the Central Montana Medical Center ER in Lewistown. Dr. Priest was the attending physician on call.<sup>22</sup> Dr. Priest informed Hart that the ER was not the proper location to seek management for his chronic pain. Dr. Priest offered Hart a Toradol injection, but Hart refused. Dr. Priest instructed Hart to follow-up with Dr. Iannacone.<sup>23</sup>

¶20 On November 6, 2006, Dr. Troop informed Hart by letter that he would no longer provide him with medical care because Hart had violated their medication agreement.<sup>24</sup>

¶21 Hart entered the Central Montana Medical Center ER on November 12, 2006, and requested an injection of Toradol. Dr. Harbour provided Hart the injection and Hart was discharged.<sup>25</sup>

¶22 On November 14, 2006, Scott K. Ross, M.D., examined Hart at Slavik’s request. Dr. Ross’ notes state that Slavik requested that he take over as Hart’s treating physician in his workers’ compensation case.<sup>26</sup> Dr. Ross performed a records review of Hart’s file and conducted a physical examination of Hart. Dr. Ross’ report noted that Dr. Troop, Hart’s previous primary care physician, would no longer treat Hart due to his “well-documented drug-seeking behaviors (narcotic pain medications).”<sup>27</sup>

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<sup>21</sup> Ex. 15 at 1-3.

<sup>22</sup> Ex. 9 at 21.

<sup>23</sup> *Id.*

<sup>24</sup> Ex. 41 at 14.

<sup>25</sup> Ex. 9 at 25.

<sup>26</sup> Ex. 35 at 1.

<sup>27</sup> *Id.*

¶23 Dr. Ross assessed Hart with “High-intensity subjective complaints of low back pain, with no objective findings on physical examination. Exaggerated and embellished pain responses and examination inconsistencies. Well documented history of narcotic abuse/overuse and drug-seeking behaviors.” Dr. Ross concluded that Hart “is malingering.” Dr. Ross assigned Hart a 0% whole person impairment rating.<sup>28</sup>

¶24 Jimmie Ashcraft, M.D., of the Deering Community Health Center in Billings,<sup>29</sup> examined Hart on November 15, 2006. Hart informed Dr. Ashcraft that he continued to perform heavy duty labor, including lifting sheet metal and other heavy objects. Dr. Ashcraft advised Hart that every time he worked heavy labor he was re-injuring his back. Dr. Ashcraft stated, “[Hart] needs to get away from doing the heavy lifting for at least a short time. This may require up to three months of light duty.”<sup>30</sup> Dr. Ashcraft prescribed Lorcet and Naprosyn for Hart’s pain. Dr. Ashcraft noted that if Hart required chronic pain medications, Hart would have to sign a medication contract.<sup>31</sup>

¶25 Hart entered the Central Montana Medical Center ER on November 15, 2006, where he received a Toradol injection.<sup>32</sup>

¶26 On November 20, 2006, Dr. Ashcraft placed Hart on light duty.<sup>33</sup>

¶27 Hart entered Deering Community Health Center on March 6, 2007, to “establish care.”<sup>34</sup> Robert Giusti, FNP, examined Hart. FNP Giusti assessed Hart with chronic back pain and noted that Hart was previously under Dr. Ashcraft’s care. FNP Giusti informed Hart that he would need to sign a controlled substance contract on that day before receiving a prescription for his pain. FNP Giusti prescribed Hart Norco and refilled Hart’s prescription for Naprosyn. FNP Giusti noted that Hart should return to work under light-duty restrictions for one month, including a 25 pound lifting restriction.<sup>35</sup> Hart was examined by different medical providers at the Deering Community Health

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<sup>28</sup> Ex. 35 at 4.

<sup>29</sup> Deering Community Health Center later changed its name to RiverStone Clinic.

<sup>30</sup> Ex. 8 at 1.

<sup>31</sup> *Id.*

<sup>32</sup> Ex. 9 at 32.

<sup>33</sup> Ex. 8 at 2.

<sup>34</sup> Ex. 5 at 1.

<sup>35</sup> *Id.*

Center on March 21, May 7, June 13, June 22, July 3, August 16, September 6, October 4, and October 25, 2007.<sup>36</sup>

¶28 On March 13, 2007, Slavik spoke to Hart. Hart informed her that he had returned to Dr. Ashcraft's office and discovered that Dr. Ashcraft had retired. Slavik informed Hart that he would need to obtain approval for a new treating physician. Slavik told Hart to ask the physician's office to fax an authorization request for Hart to change physicians. The physician's office called Slavik and informed her it would not release any information without a signed medical release. Slavik faxed a medical release to Hart.<sup>37</sup>

¶29 On March 26, 2007, Slavik spoke to Hart. Hart expressed frustration with his physicians. Slavik informed Hart that he could return to Dr. Ross for treatment or seek out a second opinion on his own.<sup>38</sup>

¶30 On April 4, 2007, an MRI of Hart's spine was taken. Dr. Hill determined that Hart suffered from degenerative disk disease, spondylolysis, and minor malalignment at L5-S1 with suspected bilateral L5 nerve root compression.<sup>39</sup>

¶31 In a June 5, 2007, letter to Slavik, Dr. Ross stated that he had reviewed Hart's chart, including reports by Steven P. Berberet, M.D., and Dr. Harbour, lab reports, and diagnostic imaging from Central Montana Medical Center. Based on his review of these documents, Dr. Ross' November 14, 2006, opinion of Hart's condition was unchanged.<sup>40</sup>

¶32 Dr. Priest examined Hart at the Central Montana Medical Center ER on June 10, 2007, and provided Hart with a Toradol injection.<sup>41</sup> Hart received more Toradol injections at the ER on June 21, 2007,<sup>42</sup> and on November 16, 2007.<sup>43</sup>

¶33 On November 19, 2007, William Keith Lara, M.D., of Northwest Spine and Pain Center in Kalispell, examined Hart. He diagnosed Hart with spondylolisthesis and

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<sup>36</sup> Ex. 5 at 2-11.

<sup>37</sup> Ex. 39 at 13.

<sup>38</sup> *Id.*

<sup>39</sup> Ex. 9 at 44.

<sup>40</sup> Ex 35 at 6-8.

<sup>41</sup> Ex. 9 at 50.

<sup>42</sup> Ex. 9 at 55.

<sup>43</sup> Ex. 9 at 63.



bilateral nerve root compression. Dr. Lara prescribed OxyContin and Roxicodone for Hart's pain. He also provided Hart a referral to Robert Hollis, M.D., at Northern Rockies Neurosurgical Associates in Kalispell.<sup>44</sup>

¶34 Gregory S. McDowell, M.D., of Orthopedic Surgeons P.S.C. in Billings, examined Hart on November 27, 2007. Dr. McDowell recommended a fusion at L5-S1.<sup>45</sup>

¶35 Steven J. Rizzolo, M.D., performed an independent medical examination of Hart on February 6, 2008. Dr. Rizzolo opined that Hart was not at maximum medical improvement (MMI) and gave him an 8% whole person impairment rating.<sup>46</sup>

¶36 On February 27, 2008, Steven P. Johnson, M.D., of Northwest Spine and Pain Center followed up with Hart regarding his condition. Dr. Johnson encouraged Hart to proceed with any surgical recommendations he might receive. Dr. Johnson reinstated a tapering of Hart's Lyrica and OxyContin drugs.<sup>47</sup>

¶37 Dr. Robert F. Hollis examined Hart on February 28, 2008. Dr. Hollis assessed Hart with a possible sacral fracture, and ongoing pain syndrome consistent with symptomatic spondylosis, lumbosacral strain, myofascial syndrome, and possible low-level radiculopathy. Dr. Hollis was not sure if Hart was a surgical candidate at that time. Dr. Hollis ordered Hart to continue pain management and left Hart's working restrictions unchanged.<sup>48</sup>

¶38 Shelley Dugan, PA-C, of Northwest Spine and Pain Center, assessed Hart on April 14, 2008. PA-C Dugan noted that Hart returned to the pain management clinic for routine follow-up for his chronic low-back pain. PA-C Dugan elected not to increase Hart's pain medications, but refilled his OxyContin, Roxicodone, and Lyrica prescriptions.<sup>49</sup>

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<sup>44</sup> Ex. 4 at 9-10.

<sup>45</sup> Ex. 9 at 69.

<sup>46</sup> Ex. 33 at 1-6.

<sup>47</sup> Ex. 11 at 1.

<sup>48</sup> Ex. 3 at 3.

<sup>49</sup> Ex. 12 at 1-2.

¶39 Dr. Priest gave Hart an injection of Toradol at the Central Montana Medical Center ER on May 25, 2008.<sup>50</sup>

¶40 On June 4, 2008, Dr. Hollis visited with Hart and opined that Hart's syndrome could best be controlled via L5-S1 arthrodesis.<sup>51</sup> Dr. Hollis' surgical recommendation was dependent on the future findings of Hart's bone SPECT scan and Hart's ability to quit nicotine use and lose 30 pounds.<sup>52</sup>

¶41 John D. Moore, M.D., was the attending physician at the Central Montana Medical Center ER when Hart sought treatment there on July 29, 2008. Hart informed Dr. Moore that he was out of pain medications. Dr. Moore wrote Hart a prescription for twenty OxyContin and informed Hart that he needed to obtain his pain medication from a pain management specialist in the future.<sup>53</sup>

¶42 On August 26, 2008, Joan M. McMahon, M.D., examined Hart at the Central Montana Medical Center ER. Dr. McMahon refilled Hart's OxyContin and Roxicodone prescriptions.<sup>54</sup> Dr. McMahon examined Hart again on November 10, 2008. She gave Hart another prescription for OxyContin and oxycodone.<sup>55</sup>

¶43 On August 27, 2008, PA-C Dugan saw Hart in the pain clinic. PA-C Dugan noted that Hart was seen by Dr. McMahon who had called to inform the pain clinic that Hart had run out of his pain medications. PA-C Dugan knew that Dr. McMahon had filled small prescriptions of OxyContin and Roxicodone to get Hart through the day. Dugan continued Hart's prescription for OxyContin and increased his amount of Roxicodone. She also prescribed Cymbalta for Hart's depression associated with chronic pain.<sup>56</sup>

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<sup>50</sup> Ex. 9 at 72.

<sup>51</sup> Ex. 3 at 13.

<sup>52</sup> Ex. 3 at 13-14.

<sup>53</sup> Ex. 9 at 80.

<sup>54</sup> Ex. 9 at 87.

<sup>55</sup> Ex. 9 at 94.

<sup>56</sup> Ex. 12 at 3-5.

¶44 Michael Schabacker, M.D., of Northern Rockies Regional Pain Center, evaluated Hart for pain management options on August 28, 2008, on the referral of Dr. Michael Geurin, of the Deering Community Health Center.<sup>57</sup> Dr. Schabacker noted that Hart continued to work and received a release for an average work day of 5 hours per day.<sup>58</sup> Hart entered into a medication agreement with Dr. Schabacker.

¶45 Wade King, NP-C, of Northern Rockies Regional Pain Center examined Hart on October 2, 2008.<sup>59</sup> NP-C King indicated that some “mixups” regarding medication prescriptions had occurred and corrected these mistakes by increasing Hart’s frequency and dosages of OxyContin and oxycodone.<sup>60</sup>

¶46 On December 2, 2008, NP-C King informed Hart that Dr. Schabacker believed Hart was attempting to secure medications from another provider. Dr. Schabacker indicated that he was no longer willing to provide care for Hart.<sup>61</sup>

¶47 Dr. Priest saw Hart in the Central Montana Medical Center ER on December 5, 2008. Hart informed Dr. Priest that he “ran out” of his oxycodone and OxyContin medications. Dr. Priest noted that Dr. Schabacker terminated his treatment of Hart after learning that Hart had obtained narcotic from Dr. McMahon. Dr. Schabacker’s office informed Dr. Priest that Dr. Schabacker would not provide Hart with any further narcotic medication. Dr. Priest provided Hart with a twenty-day prescription for oxycodone and OxyContin and told Hart that the ER should not provide him with any further narcotic refills.<sup>62</sup>

¶48 Dr. Harbour saw Hart in the Central Montana Medical Center ER on December 24, 2008. Hart requested a refill on his pain medications but left the ER before his appointment concluded.<sup>63</sup> Hart returned to the ER the next day and Dr. McMahon examined him. Hart requested pain medications from Dr. Harbour but was only administered a shot of Toradol.<sup>64</sup>

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<sup>57</sup> Ex. 42 at 1.

<sup>58</sup> Ex. 42 at 5.

<sup>59</sup> Ex. 42 at 7.

<sup>60</sup> Ex. 42 at 8.

<sup>61</sup> Ex. 42 at 13.

<sup>62</sup> Ex. 9 at 100.

<sup>63</sup> Ex. 9 at 104.

<sup>64</sup> Ex. 9 at 109.

¶49 On December 30, 2008, Wendy Ruggles, PA-C, of the RiverStone Clinic, saw Hart. PA-C Ruggles' treatment note reports that Hart was a patient of Dr. Geurin who was referred to Dr. Schabacker's office for chronic pain management. Hart informed PA-C Ruggles that he "did something that the chronic pain clinic did not like and they discontinued his care."<sup>65</sup> PA-C Ruggles recorded that Hart's contract breach with Dr. Schabacker's office broke the contract regarding controlled substances between Hart and RiverStone Clinic as well. Hart requested a note stating he is only able to work a limited number of hours per day. PA-C Ruggles opined that Hart could work up to 5 hours per day maximum and some days may not be able to work at all. PA-C Ruggles restricted Hart to no lifting. PA-C Ruggles refused to prescribe any further narcotic medication to Hart.<sup>66</sup>

¶50 On January 28, 2009, Laura Pratt, M.D., of the Northwest Spine and Pain Center examined Hart. Dr. Pratt assessed Hart with chronic low-back pain secondary to spondylosis and spondylolisthesis, radiculopathy at L5-S1, narcotic tolerance, chronic muscle spasm, depression secondary to chronic pain, and insomnia. Dr. Pratt and Hart discussed his need for taking medications on a regular basis and not overusing narcotic medication. Dr. Pratt prescribed Hart several medications, including Flexeril, Roxicodone, OxyContin, and Cymbalta. Dr. Pratt also encouraged Hart to lose 30 pounds so that he would be a candidate for surgery.<sup>67</sup>

¶51 Dr. Pratt ordered a drug test for Hart that was performed on February 3, 2009. Hart tested negative for all tested drugs including amphetamines, cocaine, marijuana, methamphetamine, opiates, phencyclidine, benzodiazepines, barbiturates, methadone, MDMA, and oxycodone.<sup>68</sup>

#### Outstanding Medical Bills

¶52 At trial, the parties stipulated that medical bills contained in Exhibits 17, 18, 20, 21, 22, and 24 remain unpaid. Hartford has not paid these bills because Hart failed to seek pre-authorization for the treatment.

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<sup>65</sup> Ex. 13 at 1.

<sup>66</sup> Ex. 13 at 1-2.

<sup>67</sup> Ex. 10 at 2.

<sup>68</sup> Ex. 10 at 3.

¶53 Hart testified that he did not seek prior authorization from Slavik for treatment from Dr. Ashcraft, for any of the treatments he received at the Yellowstone City-County Health Department, or for treatments at the Deering Community Health Center.<sup>69</sup> Hart testified that the reason he did not seek authorization from Slavik for his treatments was because he needed to prove something was wrong with his back after Dr. Ross issued his report finding that Hart had a 0% impairment rating.<sup>70</sup>

¶54 Hart missed several days of work at HCR between October 2006 and May 2009.<sup>71</sup> Hart testified that, except for periods during February 2007 which were spent at a rehabilitation facility, and one week of vacation taken shortly before he was laid off, he missed work primarily due to his back injury.<sup>72</sup> No physician that treated Hart for his injury provided him with a work restriction that stated he should be off work entirely.<sup>73</sup>

¶55 Slavik testified that until the day of trial, she had not seen Ruggles' December 30, 2008, treatment note restricting Hart to 5 work hours per day. Slavik was also unaware until the day of trial that Hart had treated with Dr. Schabacker.<sup>74</sup>

¶56 In May 2009, Hart's position at HCR was terminated due to economic reasons.<sup>75</sup> At that time, Hartford began paying Hart temporary total disability (TTD) benefits.

#### CONCLUSIONS OF LAW

¶57 This case is governed by the 2005 version of the Montana Workers' Compensation Act since that was the law in effect at the time of Hart's industrial accident.<sup>76</sup>

¶58 Hart bears the burden of proving by a preponderance of the evidence that he is entitled to the benefits he seeks.<sup>77</sup>

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<sup>69</sup> Trial Test.

<sup>70</sup> *Id.*

<sup>71</sup> Trial Test.; *see also* Exs. 32, 40.

<sup>72</sup> Trial Test.

<sup>73</sup> *Id.*

<sup>74</sup> *Id.*

<sup>75</sup> Trial Test.; Ex. 32 at 2.

<sup>76</sup> *Buckman v. Montana Deaconess Hosp.*, 224 Mont. 318, 321, 730 P.2d 380, 382 (1986).

**Issue 1: Whether Hart is entitled to retroactive temporary total and temporary partial disability benefits.**

Temporary Total Disability Benefits

¶59 Section 39-71-116(35), MCA, defines TTD as a physical condition resulting from an injury that results in total loss of wages and exists until the injured worker reaches maximum medical healing. Section 39-71-701(2), MCA, requires that a determination of TTD be supported by a preponderance of objective medical findings.

¶60 Hart argues that he is entitled to TTD benefits because wage records document a total loss of wages during certain periods of time after his injury.<sup>78</sup> Hart testified that the majority of time he missed work was due to his back pain. Hart acknowledges, however, that his only work restriction was light-duty and no physician removed him from work entirely. HCR provided Hart with the light-duty job of draftsman shortly after his injury and never asked him to exceed his light-duty restriction. I conclude that Hart has failed to meet his burden of proof that he is entitled to retroactive TTD benefits.

Temporary Partial Disability Benefits

¶61 Hart argues that for those periods of time that he earned wages in a given week, but less than his full average weekly wage, he is entitled to temporary partial disability (TPD) benefits.<sup>79</sup>

¶62 Section 39-71-116(33), MCA, states that TPD means a physical condition resulting from an injury, as defined in § 39-71-119, MCA, in which a worker, prior to maximum healing:

(a) is temporarily unable to return to the position held at the time of injury because of a medically determined physical restriction;

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<sup>77</sup> *Ricks v. Teslow Consol.*, 162 Mont. 469, 512 P.2d 1304 (1973); *Dumont v. Wickens Bros. Constr. Co.*, 183 Mont. 190, 598 P.2d 1099 (1979).

<sup>78</sup> Claimant's Proposed Findings of Fact and Conclusions of Law at 4.

<sup>79</sup> Claimant's Proposed Findings of Fact and Conclusions of Law at 5.

(b) returns to work in a modified or alternative employment; and

(c) suffers a partial wage loss.

¶63 Section 39-71-712(1), MCA, provides: “Subject to the provisions of subsection (6), if prior to maximum healing an injured worker has a physical restriction and is approved to return to a modified or alternative employment that the worker is able and qualified to perform and the worker suffers an actual wage loss as a result of a temporary work restriction, the worker qualifies for temporary partial disability benefits.”

¶64 Until December 30, 2008, Hart was restricted to light duty, which he concedes was available to him at HCR. On December 30, 2008, Ruggles restricted Hart’s work-day to 5 hours maximum with the possibility that he might not be able to work at all on some days. Hart submitted Exhibit 32, reflecting his wage loss during the period of time for which he claims entitlement to indemnity benefits. With the exception of the week of work Hart missed for a vacation, I conclude Hart is entitled to TPD benefits effective December 30, 2008, until Hartford began paying TTD benefits in May of 2009. It appears the specific dollar amount of TPD benefits to which Hart is entitled, as set forth in Exhibit 32, is not in dispute. However, the Court reserves jurisdiction to resolve this issue should the parties disagree.

**Issue 2: What periods and what amounts of temporary total disability and temporary partial disability benefits are owing and/or past due.**

¶65 This issue is redundant of Issue 1, addressed above. For the reasons set forth at ¶¶ 60 through 65, I conclude that Hart is not entitled to retroactive TTD benefits and is entitled to TPD benefits from December 30, 2008, until May of 2009.

**Issue 3: Whether Hart is entitled to retroactive and ongoing medical and wage-loss benefits.**

¶66 At the time of trial, Hart was receiving TTD benefits and Hartford had approved Hart’s ongoing treatment from Drs. Hollis and Lara. I consider Hart’s entitlement to ongoing medical and wage-loss benefits to be moot. Hart’s entitlement to retroactive wage-loss benefits has been resolved at Issues 1 and 2, above.

### Hart's Entitlement to Retroactive Medical Benefits

¶67 Some of the medical bills contained in Exhibits 17, 18, 20, 21, 22, and 24 have not been paid. Hartford contends it is not liable for payment of these bills because Hart failed to obtain prior authorization for this treatment as required by § 39-71-1101(2), MCA. Hart contends that he is entitled to payment of the disputed medical bills pursuant to *Gamble v. Sears*.<sup>80</sup> Hart argues that *Gamble* stands for the proposition that “preauthorization is not required where the pursuit of and eventual obtaining of medical information corroborates the validity of Claimant’s complaints.”<sup>81</sup>

¶68 In *Gamble*, the Montana Supreme Court held that to categorically deny payment for treatment rendered by an unauthorized physician, “without regard to the facts of each case, would directly conflict with Montana’s public policy underlying the Workers’ Compensation Act.”<sup>82</sup> The Court went on to hold:

Categorical imposition of the penalty advocated by *Sears*, based solely on a mere failure to obtain authorization, could lead to absurd outcomes wherein an injured worker is deprived of all coverage for the cost of medical treatment that is undisputedly necessary to address an injury which was plainly sustained in the course and scope of employment. Such a draconian consequence is not only unjust on its face, it also directly conflicts with the Workers’ Compensation Act’s underlying purpose of ensuring medical benefits for work-related injuries without regard to fault. Simply put, the procedural authorization rule of § 39-71-1101(2), MCA, allows the insurer an opportunity to choose a treating physician if the claimant no longer prefers the doctor he or she initially chose; it does not operate as an escape mechanism by which the insurer can avoid all liability for the cost of undisputedly necessary treatment arising from a work-related injury.<sup>83</sup>

¶69 Contrary to Hartford’s argument, the failure to obtain prior authorization for treatment does not automatically absolve the insurer from payment of the medical bills incurred. Contrary to Hart’s argument, *Gamble* did not automatically abrogate the prior authorization requirement of § 39-71-1101(2), MCA. *Gamble*, relying on several precedents, held that the decision as to whether an insurer remains liable for medical

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<sup>80</sup> 2007 MT 131, 337 Mont. 354, 160 P.3d 537.

<sup>81</sup> Claimant’s Proposed Findings of Fact and Conclusions of Law at 5.

<sup>82</sup> *Gamble* at ¶ 59.

<sup>83</sup> *Id.*



bills notwithstanding the claimant's failure to obtain prior authorization must be made with regard to the facts of each case and in adherence to the public policy underlying the Workers' Compensation Act. Undisputedly necessary medical treatment arising from a work-related injury is compensable irrespective of prior authorization.

¶70 The difficulty in the present case is that, based on the exhibits that were submitted to the Court, it is impossible for me to decipher what bills remain unpaid that would fall into the category of undisputedly necessary. Some of the bills have no corresponding medical records which would allow me to assess the necessity of the treatment. Hart's pattern of drug seeking behavior and misrepresentations to various physicians further complicates my determination. I have little doubt that Hart has suffered back pain during the time covered by the medical bills at issue. However, the manner in which Hart has gone about seeking medical care makes it virtually impossible for me to conclude that the unpaid medical bills at issue were for undisputedly necessary treatment. I therefore must conclude that Hart has not established by a preponderance of the evidence he is entitled to the retroactive medical benefits he seeks.

#### **Issue Four: Whether the Court should award attorney fees, etc.**

¶71 Section 39-71-611, MCA, states that a claimant may recover reasonable costs and attorney fees if the insurer denies liability for a claim for compensation, the claim is later adjudged compensable by the Court, and in the case of attorney fees, the Court determines that the insurers actions were unreasonable. In this case, Hart is entitled to his costs associated with the claim for TPD benefits upon which he prevailed. Because Slavik had not seen Ruggles' December 30, 2008, treatment note restricting Hart to 5 work hours per day, I cannot find that Hartford's actions in denying Hart TPD benefits were unreasonable. Therefore, I conclude Hart is not entitled to his attorney fees.

#### JUDGMENT

¶72 Hart not entitled to retroactive TTD benefits.

¶73 Hart is entitled to retroactive TPD benefits effective December 30, 2008, until May of 2009.

¶74 Hart is not entitled to retroactive medical benefits.

¶75 Hart is entitled to costs associated with his claim for TPD benefits upon which he prevailed.

¶76 Hart is not entitled to any attorney fees.

¶77 Pursuant to ARM 24.5.348(2), this Judgment is certified as final and, for purposes of appeal, shall be considered as a notice of entry of judgment.

DATED in Helena, Montana, this 7<sup>th</sup> day of April, 2010.

(SEAL)

JAMES JEREMIAH SHEA  
JUDGE

c: Richard J. Martin  
William O. Bronson  
Date Submitted: October 22, 2009