

IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

2012 MTWCC 1

WCC No. 2008-2165

PAUL SCOTT PEARSON

Petitioner

vs.

MONTANA INSURANCE GUARANTY ASSOCIATION

Respondent/Insurer.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND JUDGMENT

Summary: Petitioner suffered an industrial injury, including a traumatic brain injury, in 1995. In 1997, he settled his claim. Petitioner contends that his settlement agreement with Respondent is void, invalid, or unenforceable and that this Court should order his claim reopened. Petitioner further argues that the insurer unreasonably adjusted his claim and that he should be entitled to reasonable attorney fees and a penalty. Respondent contends that: Petitioner's claim is barred by a statute of limitations; no grounds exist to order reopening of Petitioner's settlement; and statutorily, it cannot be held liable for attorney fees or a penalty.

Held: Petitioner was not competent to enter into the settlement agreement and it is therefore void. Respondent is not an insurer within the meaning of that term under the Workers' Compensation Act. Therefore, it cannot be subject to attorney fees or a penalty under §§ 39-71-611, -2907, MCA.

Topics:

Settlements: Reopening: Rescission. Since Petitioner signed the settlement agreement on his own behalf and was found by the Court to be incompetent at the time of the agreement, the agreement is subject to rescission pursuant to § 28-2-203, MCA, because Petitioner was of "unsound mind." Pursuant to § 27-2-202, MCA, an action founded on a written contract must be commenced within eight years, and since Petitioner filed his Petition for Trial a little over three years after the statute of limitations ran, the Petition would have been time-barred but for the

five-year extension of the statute of limitations provided for in § 27-2-401(1), MCA, when an individual suffers from serious mental illness.

Contracts: Generally. Since Petitioner signed the settlement agreement on his own behalf and was found by the Court to be incompetent at the time of the agreement, the agreement is subject to rescission pursuant to § 28-2-203, MCA, because Petitioner was of “unsound mind.” Pursuant to § 27-2-202, MCA, an action founded on a written contract must be commenced within eight years, and since Petitioner filed his Petition for Trial a little over three years after the statute of limitations ran, the Petition would have been time-barred but for the five-year extension of the statute of limitations provided for in § 27-2-401(1), MCA, when an individual suffers from serious mental illness.

Constitutions, Statutes, Regulations, and Rules: Montana Code Annotated. 28-2-203. Since Petitioner signed the settlement agreement on his own behalf and was found by the Court to be incompetent at the time of the agreement, the agreement is subject to rescission pursuant to § 28-2-203, MCA, because Petitioner was of “unsound mind.” Pursuant to § 27-2-202, MCA, an action founded on a written contract must be commenced within eight years, and since Petitioner filed his Petition for Trial a little over three years after the statute of limitations ran, the Petition would have been time-barred but for the five-year extension of the statute of limitations provided for in § 27-2-401(1), MCA, when an individual suffers from serious mental illness.

Constitutions, Statutes, Regulations, and Rules: Montana Code Annotated. 27-2-202. Since Petitioner signed the settlement agreement on his own behalf and was found by the Court to be incompetent at the time of the agreement, the agreement is subject to rescission pursuant to § 28-2-203, MCA, because Petitioner was of “unsound mind.” Pursuant to § 27-2-202, MCA, an action founded on a written contract must be commenced within eight years, and since Petitioner filed his Petition for Trial a little over three years after the statute of limitations ran, the Petition would have been time-barred but for the five-year extension of the statute of limitations provided for in § 27-2-401(1), MCA, when an individual suffers from serious mental illness.

Constitutions, Statutes, Regulations, and Rules: Montana Code Annotated. 27-2-401. Since Petitioner signed the settlement agreement on his own behalf and was found by the Court to be incompetent at the

time of the agreement, the agreement is subject to rescission pursuant to § 28-2-203, MCA, because Petitioner was of “unsound mind.” Pursuant to § 27-2-202, MCA, an action founded on a written contract must be commenced within eight years, and since Petitioner filed his Petition for Trial a little over three years after the statute of limitations ran, the Petition would have been time-barred but for the five-year extension of the statute of limitations provided for in § 27-2-401(1), MCA, when an individual suffers from serious mental illness.

Constitutions, Statutes, Regulations, and Rules: Montana Code Annotated: 33-10-105. Although the Montana Insurance Guaranty Association is considered an insurer for certain purposes under this statute, a claimant’s remedy in the form of attorney fees and/or a penalty are found within the WCA, and therefore MIGA would have to be considered an insurer under the applicable WCA statutes for this Court to assess a penalty and/or attorney fees under the WCA.

Constitutions, Statutes, Regulations, and Rules: Montana Code Annotated. 39-71-116. The Montana Insurance Guaranty Association is not an “insurer” as defined in § 39-71-116, MCA, and within the meaning of the WCA, which provides that attorney fees and penalties can only be awarded in cases involving insurers. Since it is not an insurer, MIGA is not subject to the penalty and attorney fee statutes of the WCA.

Constitutions, Statutes, Regulations, and Rules: Montana Code Annotated. 39-71-611. The Montana Insurance Guaranty Association is not an “insurer” as defined in § 39-71-116, MCA, and within the meaning of the WCA, which provides that attorney fees and penalties can only be awarded in cases involving insurers. Since it is not an insurer, MIGA is not subject to the penalty and attorney fee statutes of the WCA.

Constitutions, Statutes, Regulations, and Rules: Montana Code Annotated. 39-71-2907. The Montana Insurance Guaranty Association is not an “insurer” as defined in § 39-71-116, MCA, and within the meaning of the WCA, which provides that attorney fees and penalties can only be awarded in cases involving insurers. Since it is not an insurer, MIGA is not subject to the penalty and attorney fee statutes of the WCA.

Attorney Fees: Montana Insurance Guaranty Association. The Montana Insurance Guaranty Association is not an “insurer” as defined in § 39-71-116, MCA, and within the meaning of the WCA, which provides

that attorney fees and penalties can only be awarded in cases involving insurers. Since it is not an insurer, MIGA is not subject to the penalty and attorney fee statutes of the WCA.

Penalties: Montana Insurance Guaranty Association. The Montana Insurance Guaranty Association is not an “insurer” as defined in § 39-71-116, MCA, and within the meaning of the WCA, which provides that attorney fees and penalties can only be awarded in cases involving insurers. Since it is not an insurer, MIGA is not subject to the penalty and attorney fee statutes of the WCA.

¶ 1 The trial in this matter occurred on November 8, 9, and 10, 2010, at the Workers’ Compensation Court. Petitioner Paul Scott Pearson was present and was represented by Norman L. Newhall. Geoffrey R. Keller represented Respondent Montana Insurance Guaranty Association (MIGA).

¶ 2 Exhibits: I admitted Exhibits 1 through 40 without objection, except for Exhibit 8, page 25, which the parties removed from the exhibit notebook.

¶ 3 Witnesses and Depositions: The parties agreed that the depositions of Pearson, Greg Pearson (Greg), James W. Pearson (Jim), Lorraine Johnson, Paul J. Bach, Ph.D., Joe C. Maynard, and Joseph K. McElhinny, Psy.D. can be considered part of the record. J. David Slovak, Dr. Bach, Marjorie Hickey, Judy (Roller) Linderman, Greg, Pearson, Dr. McElhinny, and Maynard testified.

¶ 4 At the start of trial, MIGA argued that it is statutorily immune from a penalty assessment and asked to brief the issue. MIGA also asked the Court to take judicial notice of the pertinent statutes. Pearson responded that MIGA’s defense may be untimely raised and asked the Court to reserve ruling on the issue. I reserved ruling on MIGA’s argument and allowed testimony on the penalty issue. I advised the parties that if I concluded that Valor Insurance Company (Valor) unreasonably adjusted Pearson’s claim, I would revisit the issue of whether MIGA may be statutorily immune from a penalty.

¶ 5 I subsequently advised the parties that my decision in this case would set aside the settlement agreement, and that I would find Valor’s adjustment of Pearson’s claim to be unreasonable. Therefore, I ordered the parties to simultaneously brief the issue of whether MIGA could be assessed a penalty and attorney fees.¹

¹ Minute Book Hearing No. 4252, Docket Item No. 64.

¶ 6 Issues Presented: The Pretrial Order sets forth the following issues:²

Issue One: Whether Petitioner's claims are barred by the applicable statutes of limitations, found at §§ 27-2-202, -203, MCA;

Issue Two: Whether the settlement agreement between Petitioner and Valor Insurance Company, approved June 12, 1997, should be reopened or set aside on the grounds set forth in the Petition for Trial; and

Issue Three: Whether Petitioner is entitled to attorney fees, costs, and a penalty pursuant to §§ 39-71-611, -2907, MCA.

FINDINGS OF FACT

¶ 7 I found the trial testimony of all witnesses to be credible.

¶ 8 On November 15, 1995, Pearson suffered an industrial injury from a motor vehicle accident while performing his job duties for Missoula Sheet Metal. Valor accepted liability for the claim.³

¶ 9 Greg Pearson is Pearson's older brother.⁴ Greg worked as the general manager of the commercial roofing department at Western Sheet Metal when Pearson began working there as a roofer. Greg testified that Pearson was quickly promoted to roofing foreman. Greg stated that Pearson was smart and "could handle people."⁵ Greg testified that Pearson was an "excellent" foreman, and that his job responsibilities involved supervising people, understanding product installation, scheduling, and hiring workers.⁶ Greg testified that prior to the industrial accident, Pearson was "a great guy. You would like him dating your daughter [Y]ou would like to go fishing with him."⁷

² Pretrial Order at 2, Docket Item No. 61.

³ Pretrial Order, Uncontested Facts, at 1.

⁴ Trial Test.

⁵ Greg Dep. 7:16 – 8:10.

⁶ Trial Test.

⁷ Greg Dep. 43:15-18.

¶ 10 Judy (Roller) Linderman⁸ worked as a claims manager for Valor from approximately 1994 until 1999. Linderman believes she is the only person who adjusted Pearson's claim while she worked at Valor.⁹

¶ 11 On December 4, 1995, Pearson was scheduled to be transferred to Community Medical Center in Missoula for further rehabilitation, evaluation of his pulmonary status, and surgery on his left knee.¹⁰ Pearson's assessment was status post chest contusion with multiple rib fractures and subsequent necrotizing pneumonia; status post tension hemopneumothorax; left scapular fracture; dislocated left knee; and splenectomy.¹¹

¶ 12 On December 7, 1995, Pearson's medical chart indicated that he was difficult to rouse for therapy. The medical provider noted that Pearson had moderate to severe memory loss which would affect his safety for going home alone. The provider noted that Pearson might be a good candidate for the Bridges Program (Bridges), which operates out of the Community Medical Center in Missoula.¹²

¶ 13 On December 8, 1995, Tamara Bradley, RN, MSW, Care Manager for Bridges, noted that she had met with Pearson regarding entering the day-treatment program at Bridges prior to knee surgery. She stated that Michael J. Schutte, M.D., intended to have Pearson evaluated after discharge to determine the amount of mobility he could tolerate, and that Dr. Schutte would then notify Bridges of his decision.¹³

¶ 14 Beginning on December 8, 1995, Pearson attended rehabilitation and physical therapy sessions for his knee injury at Northern Rockies Rehabilitation and Athletic Training Center. Pearson was initially cooperative and made good progress, although he exhibited some cognitive difficulties.¹⁴ His rehabilitation counselor tried to help him overcome the problems this caused in his rehabilitation, suggesting, for example, that Pearson set an alarm three or four times a day to remind him to exercise.¹⁵ Pearson's

⁸ The witness is currently known as Judy Linderman. At the time she adjusted Pearson's claim, she was known as Judy Roller. In these findings, she is identified as "Linderman" regarding her current testimony and "Roller" in reference to exhibits contemporaneous with her use of that surname.

⁹ Trial Test.

¹⁰ Ex. 20 at 1.

¹¹ Ex. 20 at 2.

¹² Ex. 26 at 15.

¹³ Ex. 20 at 51.

¹⁴ See, e.g., Ex. 24 at 4 ("[R]eports feeling better daily, also reports hard to get motivated for exercises @ home. . . . [S]peech slow & has [trouble] remembering things. Has some difficulty keeping count during exercises . . .").

¹⁵ Ex. 24 at 5.

sister reported difficulty in getting Pearson to perform his at-home exercises on numerous occasions.¹⁶

¶ 15 On December 11, 1995, Valor requested the services of Marjorie Hickey, RN, MSN, in Pearson's case.¹⁷ Hickey is a registered nurse and certified case management nurse who also performs medical legal consulting. Hickey has been a nurse since 1972 and has managed cases since 1984.¹⁸ Hickey testified that her duties would have included obtaining recommended medical services for Pearson, including physical therapy, occupational therapy, and a cognitive evaluation.¹⁹

¶ 16 On December 19, 1995, Bradley sent Hickey information about Bridges.²⁰ The brochure describes Bridges as "a post-acute comprehensive day treatment and residential transitional living program for adults who have sustained a brain injury or other neurological impairment."²¹ The brochure explains, "All candidates . . . must be able to benefit from rehabilitation services. . . . [C]andidates will also be medically stable and able to tolerate several hours of therapeutic intervention each day."²²

¶ 17 On January 4, 1996, Hickey generated her initial case management report regarding Pearson's claim. Hickey noted that Pearson was evaluated for memory problems, low cognitive skills, sequencing inability, and inattention to activities of daily living when he was admitted to Community Medical Center. He was discharged with recommendations that he enter Bridges. She stated, "That was assessed and seen as too rigorous a regime for Mr. Pearson."²³ Pearson instead attended outpatient occupational therapy.²⁴

¶ 18 Hickey further noted that Pearson's sister Mary Chris was "very concerned" about Pearson's cognitive deficits, memory problems, and confusion, and that she was "very interested" in occupational therapy or Bridges. Hickey explained:

We reviewed the schedule of the Bridges Program and I explained to her my concerns that Mr. Pearson should be protected from large groups right

¹⁶ See, e.g., Ex. 24 at 6.

¹⁷ Trial Test.

¹⁸ Trial Test.

¹⁹ Trial Test.

²⁰ Ex. 31 at 9.

²¹ Ex. 31 at 10.

²² Ex. 31 at 10.

²³ Ex. 31 at 12-13.

²⁴ Ex. 31 at 13.

now as he was still at risk with his pneumonia. He was still healing from the severe trauma he had endured and needed time to build up his stamina. She later agreed that the day-long Bridges Program would overtax her brother.²⁵

¶ 19 In Hickey's report, she drafted a section titled "Quality Assurance and Cost Containment Measures," in which she stated:

1. The Bridges Program recommended for Mr. Pearson was at a high cost between \$550 and \$650 per day for possibly up to a month. This would lead to a total of \$16-20,000 for 1 month. I reviewed his condition and went over the situation with Tammy Bradley, the case manager with Bridges. I explained to her that because of Mr. Pearson's low stamina and risk for infection, and he may not be appropriate for this type of referral. I recommended occasional PT visits to the adjuster. Mr. Pearson is making excellent progress with recovering his memory and did it in a more cost efficient manner with occasional OT visits so he wouldn't get frustrated. I consulted with Dr. Stone for the OT referral.

2. Mr. Pearson is at risk for infection and relapse of his pneumonia. I went over with he and his sister the importance of rest and naps, and keeping him away from groups and the general public. The influenza virus is still very active in the Missoula area. I felt the best thing would be for him to recuperate at home with intermittent PT, OT and doctor visits. Currently, he is making good progress.²⁶

¶ 20 Hickey testified that she decided Bridges would not be appropriate for Pearson at that time because of the recommendations of his medical providers. Hickey testified that she believed Dr. Stone thought Bridges may have been too rigorous for Pearson at the time of his release from Community Medical Center because he was recovering from pneumonia. She further recalled that Shull Lemire, M.D., was concerned that, with knee surgery scheduled in the near future, Pearson needed time to rest and did not need to be exposed to large numbers of people.²⁷

¶ 21 Hickey testified that she believed it would be better for Pearson to attend physical therapy and occupational therapy at levels he could more readily tolerate. Hickey further noted that Bridges would have cost between \$550 and \$650 per day, and that a

²⁵ Ex. 31 at 14.

²⁶ Ex. 31 at 15.

²⁷ Trial Test.

month-long use of the program could cost \$16,000 to \$20,000. Hickey testified that she took into consideration that Valor would want to save some of the rehabilitation money for use in the future.²⁸ Linderman testified that she did not see Hickey's role to include directing Pearson's care or containing costs.²⁹ Linderman testified that Valor would have authorized Bridges if Pearson had been found to be a candidate for it.³⁰

¶ 22 On February 4, 1996, Hickey filed an update on Pearson's case. Under "Quality Assurance and Cost Containment" she noted:

Costly OT with the Bridger [sic] Program was averted. Mr. Pearson and his sister feel no further OT is needed at this time. His memory is continuing to improve, so OT was discontinued.³¹

¶ 23 On March 8, 1996, psychologist William A. Hahnstadt, Ph.D., evaluated Pearson at Hickey's request to determine Pearson's psychological status and to recommend additional evaluation and treatment. Dr. Hahnstadt found Pearson mildly to moderately depressed. Pearson reported increased difficulty with initiating and following through with activities. Dr. Hahnstadt recommended a neuropsychological evaluation including additional assessment of personality and emotional functioning to assist with the development of a treatment plan and vocational rehabilitation options.³²

¶ 24 On March 25, 1996, Hickey issued a follow-up report. She noted that Pearson was experiencing increased depression and crying with increasingly poor moods.³³ Hickey noted that Dr. Hahnstadt diagnosed Pearson with depression and recommended further evaluation.³⁴

¶ 25 On April 20 and 22, 1996, Dr. Hahnstadt conducted a variety of tests to assess Pearson's condition. The results indicated clear evidence of depression and brain trauma as reflected through impairments in memory functions and complex visuospatial organization skills, decreased efficiency within abstraction abilities, and occasional delays and slowing in responses. Testing showed evidence of impairments in immediate memory span and short-term memory. Dr. Hahnstadt found Pearson to have significant depression with strong feelings of unhappiness, pessimism, uselessness,

²⁸ Trial Test.

²⁹ Trial Test.

³⁰ Trial Test.

³¹ Ex. 31 at 19.

³² Ex. 22 at 1-2.

³³ Ex. 31 at 21.

³⁴ Ex. 31 at 22.

and tension with behavioral manifestations including limited activity, sleep and appetite disturbance, and withdrawal.³⁵

¶ 26 Dr. Hahnstadt noted:

Evaluation results are consistent with the diagnostic criteria for a Major Depressive Disorder, Single Episode, and Dementia due to Head Trauma. His depression consists of a persistent depressed mood, anhedonia, sleep and appetite disturbance, limited energy and activity levels, and strong feelings of uselessness and pessimism. The dementia is evidenced primarily as deficits in memory functions and complex visuospatial organization skills, episodic delays and slowing of responses, and decreased efficiency within abstract reasoning abilities. Given the current level of depression, the severity of his cognitive impairments is likely to be more pronounced.³⁶

Dr. Hahnstadt recommended that Pearson receive: antidepressant medication and psychotherapy; a re-evaluation of memory, visual perceptual, and abstraction functions in three months; and participation in a computer skills class to increase activity level and involvement with others.³⁷

¶ 27 On April 23, 1996, Pearson failed to attend a physical therapy appointment.³⁸ At his April 25, 1996, appointment, he expressed frustration with the pace of rehabilitation and reported that he was not exercising as much as he could.³⁹ On June 18, 1996, Pearson reported feeling as if his progress had reached a plateau.⁴⁰

¶ 28 In Hickey's May 10, 1996, report, she reported that she met with Pearson and observed notable depression. Pearson complained of low energy and he was procrastinating on his independent exercise schedule. Hickey noted, "We discussed the need to move forward with anti-depressant medication and a more structured daily plan." However, rather than pursue admission to a structured program such as Bridges,

³⁵ Ex. 22 at 4-6.

³⁶ Ex. 22 at 6.

³⁷ Ex. 22 at 6.

³⁸ Ex. 24 at 34.

³⁹ Ex. 24 at 35.

⁴⁰ Ex. 24 at 53.

Hickey merely urged Pearson to set a specific time to exercise each day and to stick to his self-imposed schedule.⁴¹

¶ 29 On May 20, 1996, Dr. Hahnstadt noted Pearson reported an increase in his depression. Dr. Hahnstadt reported that increasing Pearson's Zoloft dosage improved his mood, sleep and appetite, and increased his energy levels. Dr. Hahnstadt recommended 10 to 12 psychotherapy sessions to reinforce Pearson's improvement, to help Pearson develop better coping strategies, and to address Pearson's alcohol use.⁴²

¶ 30 On June 4, 1996, Gerry B. Blackman, CRC, CCM, issued an initial employability assessment report about Pearson. Blackman noted that Pearson had received medical care and psychological treatment for depression since his industrial injury. Blackman met with Pearson twice. Blackman also received a job analysis for Pearson's time-of-injury employment, which Dr. Schutte disapproved. Blackman focused on two vocational rehabilitation options: eight weeks of job placement assistance in medically approved occupational areas, and short-term vocational retraining in an appropriate occupational area. Blackman noted that Pearson was three semesters short of a bachelor's degree, but that he was interested in "starting over in a technical course," which Blackman did not believe was an appropriate option.⁴³

¶ 31 On July 3, 1996, Linderman (then Roller), wrote a letter to Pearson in which she expressed concern that Pearson had been avoiding Blackman. Roller informed him that failure to cooperate could result in the termination or interruption of his benefits. Roller stated that she would begin the termination notice requirements if she did not hear from him.⁴⁴

¶ 32 On July 12, 1996, Hickey reported that Pearson was doing well physically and was exercising and attending physical therapy. She noted that the Zoloft appeared to improve Pearson's mood and that he reported more energy. However, she further noted that Pearson "discussed a pre-existing alcohol problem" with her, and that he was concerned that he might require inpatient treatment.⁴⁵ Hickey noted that Pearson no longer wished to treat with Dr. Hahnstadt.⁴⁶ Hickey further noted that Pearson had left town for several weeks, missed medical appointments, and was difficult to meet with. Hickey also noted that Pearson had moved out of his sister's home and had broken up

⁴¹ Ex. 31 at 25.

⁴² Ex. 22 at 6.

⁴³ Ex. 32 at 3-6.

⁴⁴ Ex. 8 at 9.

⁴⁵ Ex. 31 at 30.

⁴⁶ Ex. 31 at 30-31.

with his girlfriend.⁴⁷ At trial, Hickey opined that Pearson's cognitive issues and mood disorder probably played a role in Pearson's failure to keep appointments and failure to contact Blackman.⁴⁸

¶ 33 Pearson denied having problems with alcohol prior to the industrial accident and denied telling Hickey that he had a pre-existing alcohol problem.⁴⁹ Pearson testified that he does not have much recollection of late summer 1996, although he recalls "cycling rather severely between manias and depression" and testified that he spent three or four months "bouncing off the walls" in a manic state.⁵⁰ During that time, he slept one or two hours a day and engaged in inappropriate behavior.⁵¹

¶ 34 Greg recalled that Pearson lived with their sister Mary Chris from late December 1995 until approximately July 1996.⁵² Pearson testified that he moved out of his sister's house because he was in "an extremely euphoric state" and he does not believe he was making good decisions. Pearson characterized his behavior at that time as "bizarre and radical."⁵³

¶ 35 Greg testified that Pearson began getting into fights and that he suffered injuries from fighting on several occasions.⁵⁴ Greg testified that on one occasion, he refused to lend Pearson money and Pearson punched him from behind. Greg stated that prior to the industrial accident, he and Pearson had never had any physical altercations.⁵⁵

¶ 36 On July 16, 1996, attorney Douglas J. DiRe informed Roller that he would represent Pearson regarding his workers' compensation claim. DiRe requested a copy of Valor's claim file.⁵⁶ Pearson testified that at the time DiRe represented him, Pearson was not aware of things. He stated that DiRe would hand him papers, tell him to sign them, and he would sign them.⁵⁷

⁴⁷ Ex. 31 at 31.

⁴⁸ Trial Test.

⁴⁹ Trial Test.

⁵⁰ Pearson Dep. 32:18-25.

⁵¹ Pearson Dep. 33:1-8.

⁵² Greg Dep. 13:1-6.

⁵³ Pearson Dep. 30:5-22.

⁵⁴ Trial Test.

⁵⁵ Trial Test.

⁵⁶ Ex. 8 at 11.

⁵⁷ Trial Test.

¶ 37 Pearson's brother Jim testified that he and DiRe were good friends.⁵⁸ Greg likewise testified that DiRe was a personal friend of his and Pearson's and that Pearson and DiRe were "extremely close."⁵⁹ Greg testified that DiRe and Pearson had been high school friends and college roommates, and that Pearson was the more dominant personality of the two.⁶⁰

¶ 38 On August 6, 1996, Pearson's physical therapist reported that Pearson ended his session early.⁶¹ The therapist noted that Pearson used profanity in addressing a staff member. The therapist intervened and Pearson stated that he was unhappy with the way he had been spoken to. The therapist attempted to reach Pearson by phone later that day. Pearson returned the call and requested a meeting.⁶² The therapist reported that Pearson was calmer, but remained upset, and stated that no one told him what to do. Later that day, the office manager notified Hickey about Pearson's behavior and also reported that in an earlier incident, Pearson had removed his pants and underwear and "mooned" the staff and clients when a photographer was photographing the facility. Pearson was instructed to talk with Dr. Schutte before returning for rehabilitation.⁶³

¶ 39 On August 8, 1996, Pearson's physical therapist noted that Pearson apologized and acknowledged that he needed to get help for his behavior. Pearson did not schedule another physical therapy session pending a meeting with Dr. Schutte to discuss his behavior.⁶⁴

¶ 40 On August 12, 1996, Dr. Schutte noted that he had a long discussion with Pearson concerning his depression. Pearson said he was unhappy with Hickey and Dr. Hahnstadt, who Pearson felt had "taken over" his healthcare. Dr. Schutte noted that he informed Pearson that he would try to advocate for him, but that this was beyond Dr. Schutte's expertise.⁶⁵

¶ 41 On August 14, 1996, Blackman issued a status report which indicated that Pearson had been non-compliant and non-participatory in his vocational rehabilitation. Blackman stated that Pearson had failed to provide requested information or keep appointments, and intended to pursue his own course of vocational rehabilitation.

⁵⁸ James Dep. 21:15-16.

⁵⁹ Greg Dep. 17:15-21.

⁶⁰ Trial Test.

⁶¹ Ex. 24 at 65.

⁶² Ex. 24 at 66.

⁶³ Ex. 24 at 67.

⁶⁴ Ex. 24 at 68.

⁶⁵ Ex. 18 at 26-27.

Blackman stated that Pearson had left the area for over a month and that upon his return, he retained DiRe and promised to cooperate. Blackman and Hickey met with Pearson and DiRe to discuss Pearson's case. Pearson agreed to work with Hickey to resolve his issues with Dr. Hahnstadt, to complete requested vocational tests, to sign a consent form to allow Blackman to obtain some transcripts, and to keep his appointments and communicate with his providers in a timely manner. Blackman noted that she believed the most promising course of action for vocational rehabilitation would be for Pearson to complete his B.A., although while Blackman intended to pursue that option further, Pearson preferred to pursue technical training at another institute. Blackman noted that DiRe was willing to settle the vocational rehabilitation benefits based on the amount of time it would take Pearson to finish a B.A.⁶⁶

¶ 42 On August 21, 1996, Caroline Myhre, RN, noted that Pearson had contacted her, stating that he had missed an appointment and that he had been having problems with his short-term memory. Pearson informed Myhre that he had been driving and discovered that he did not know where he was. Myhre advised Pearson to stay with someone or to check into a medical facility for care.⁶⁷

¶ 43 On August 26, 1996, Pearson applied for voluntary admission to the mental health facility at St. Patrick Hospital in Missoula.⁶⁸ J.D. Stone, M.D., evaluated Pearson. Dr. Stone reported that Pearson had recently had problems due to his traumatic brain injury, including significant memory deficits and difficulty controlling his temper. Pearson had recently been involved in an altercation which resulted in a few days in jail. Pearson's family was concerned for his well-being; however, Pearson reported that he had more energy and was happier than he had ever been. Pearson admitted alcohol abuse and occasional marijuana use.⁶⁹ Dr. Stone examined Pearson, noting slightly pressured speech, slightly tangential, with grandiose thinking. Dr. Stone noted some suspiciousness in Pearson's conversation and that Pearson was highly distractible with an "extremely bright" affect. Dr. Stone diagnosed Pearson with an organic mood disorder with probable manic stage, cognitive sequelae, traumatic brain injury, and substance abuse.⁷⁰ Dr. Stone did not find Pearson to be a risk to himself or others and, since Pearson was a voluntary committal "insisting on discharge," Dr. Stone discharged

⁶⁶ Ex. 32 at 11-12.

⁶⁷ Ex. 18 at 28.

⁶⁸ Ex. 21 at 12.

⁶⁹ Ex. 21 at 1.

⁷⁰ Ex. 21 at 2.

him with a prescription for Tegretol (carbamazepine). Dr. Stone further noted that Pearson was “very agreeable” to entering Bridges to work on his cognitive deficits.⁷¹

¶ 44 On September 10, 1996, Dr. Stone saw Pearson for a follow-up appointment. Pearson reported some improvements since beginning Tegretol, but Pearson still experienced temper problems and he was hyperv verbal. Dr. Stone noted that Pearson had been stopped for speeding twice in the last several days. Dr. Stone found Pearson to have grandiose thinking, hyperv verbal with pressured speech, restlessness and easily distracted. Dr. Stone’s impression was organic mood disorder (manic), organic personality disorder, late effects of traumatic brain injury, and substance abuse.⁷² Dr. Stone ordered a CBC and liver panel to check Pearson’s carbamazepine level, noting that he suspected Pearson was not taking the correct dosages.⁷³

¶ 45 On October 1, 1996, Dr. Stone saw Pearson and noted that Pearson reported having “a terrible time.” Pearson related that he was giving people gifts, picking up hitchhikers and giving them money, and engaging in other inappropriate spending. Pearson understood that he was spending inappropriately, but was unable to stop. Pearson also told Dr. Stone he was receiving approximately two speeding tickets per week. Dr. Stone noted that Pearson was desperate for help and wanted someone to help him with his finances and with organizational skills. Pearson admitted that he continued to drink alcohol socially. Dr. Stone found Pearson to be very grandiose in his thinking with pressured speech, very animated, and copious profanity, with continued evidence of euphoria. Dr. Stone stated:

I still think Scott needs treatment and I still think that Community Bridges offers the best treatment currently. He needs help with structuring his life, working on budgeting and figuring out his financial difficulties. He also needs work on some of his other cognitive deficits such as memory and judgement.

I gave him a prescription today for Community Bridges.⁷⁴

¶ 46 On October 1, 1996, John R. Harrison, Ph.D., saw Pearson for a neuropsychological consultation. Pearson reported a significant history of substance abuse, including smoking marijuana and using cocaine.⁷⁵ Pearson was in a manic state

⁷¹ Ex. 21 at 3.

⁷² Ex. 21 at 4.

⁷³ Ex. 21 at 5.

⁷⁴ Ex. 21 at 7.

⁷⁵ Ex. 23 at 1-2. At trial, Pearson testified that he does not recall telling Dr. Harrison that he abused alcohol or drugs prior to his industrial accident.

and informed Dr. Harrison that he was hyperactive and slept approximately three hours a night. Pearson complained of severe short-term memory deficit, aggression, agitation, and disinhibition. Pearson reported legal violations, speeding, and “impulsive check writing.” Pearson reported that three weeks after he changed residences, he found himself unable to find his way home. Pearson also reported angry outbursts, including one in Dr. Schutte’s office that led to his admission to Providence Center.⁷⁶

¶ 47 Dr. Harrison doubted the reliability of Pearson’s reporting. Dr. Harrison noted that Pearson was distractible, hyperactive, and prone to repeating himself.⁷⁷ Dr. Harrison found Pearson to exhibit very poor judgment. Dr. Harrison’s impression was that Pearson might have suffered a traumatic brain injury followed by significant cognitive sequelae. Dr. Harrison noted that Pearson had suffered a major depressive incident which resolved with Zoloft, but Pearson now appeared to be in the midst of a full manic episode which could be post-traumatic in origin. Dr. Harrison stated that it was important to get Pearson’s mood disorder under control and recommended that Pearson then receive a neuropsychological evaluation to determine the underlying cognitive sequelae. Dr. Harrison opined:

I think Scott will need to be placed in a program which can provide the degree of structure necessary to ensure medication compliance. I think medication should be reevaluated in view of the intense manic episode. There has been some consideration of the Community Bridges program. I think this could provide a higher degree of structure to ensure the medication compliance and begin to sort out the cognitive nature of this disorder. If this is not successful, Mr. Pearson may need to be hospitalized in-patient in order to achieve biological stability. This should occur as soon as possible.⁷⁸

¶ 48 On October 3, 1996, Dr. Harrison noted:

Had the opportunity to meet with the clinical director, program director and care management for the Community Bridges Program. The purpose of the meeting was to evaluate Mr. Pearson’s candidacy for the program. The consensus of the group was that Mr. Pearson is not a candidate at this time due to his manic behavior. The decision was made to re-

⁷⁶ Ex. 23 at 2.

⁷⁷ Ex. 23 at 2.

⁷⁸ Ex. 23 at 3.

evaluate his candidacy once his mood disorder has been brought under better control.⁷⁹

¶ 49 On October 4, 1996, Dr. Harrison noted that he had discussed Pearson's case with Greg and DiRe and that they believed Pearson's behavior had improved but remained "far from normal." Greg informed Dr. Harrison that Pearson might be taking his medication inappropriately. Dr. Harrison asked Greg to ensure that Pearson attended his next appointment with Michael J. Silverglat, M.D., so that Dr. Silverglat could evaluate Pearson's mood disorder.⁸⁰

¶ 50 On October 7, 1996, Hickey reported that Pearson continued to exhibit erratic behavior and that he had had outbursts at Dr. Schutte's office and during physical therapy. Pearson refused to see Dr. Hahnstadt. Hickey consulted with Dr. Schutte, who referred Pearson to other medical providers to follow up on his medication difficulties and behavior problems. Hickey noted that she informed DiRe and Pearson's family that she and Dr. Schutte were concerned about Pearson's safety. He was failing to keep appointments and he was avoiding Blackman and her. She further noted that Pearson had been involved in an altercation that resulted in him going to jail and being admitted to the Mental Health Unit at St. Patrick Hospital in Missoula. Hickey reported that Dr. Stone had noted Pearson had alcohol and drug problems, and tangential and grandiose thinking and talking, and that he diagnosed Pearson with organic mood disorder with probable manic stage, cognitive sequelae, traumatic brain injury, and substance abuse.⁸¹ From the evidence submitted, this appears to be Hickey's last report, and presumably her involvement with Pearson's case ended shortly thereafter. However, Hickey no longer possesses her copy of Pearson's file. Prior to trial, she reviewed records provided by Pearson's counsel, who had received those from Valor. Hickey reported that her records appeared to be incomplete and she believes she may have generated additional reports.⁸²

¶ 51 On October 7, 1996, Dr. Silverglat issued a report in which he noted that he had seen Pearson, accompanied by Greg, for a consultation. Dr. Silverglat reviewed some of Pearson's medical records and discussed Pearson's behavior with Pearson and Greg, noting that Pearson had been taking Zoloft for several months and that Pearson was "very fond of Zoloft because it makes him feel euphoric." Pearson and Greg reported that Pearson slept poorly but had "boundless" energy and a virtually non-existent appetite. Greg reported that Pearson's attention span was very short, and that

⁷⁹ Ex. 23 at 4.

⁸⁰ Ex. 23 at 4.

⁸¹ Ex. 31 at 33-34.

⁸² Trial Test.

since the industrial accident Pearson had become quick-tempered and did not seem to care about other people. Greg reported that Pearson had lost interest in outdoor activities and did not follow through with plans. He further reported that Pearson did not finish things he started, that he propositioned multiple women on a daily basis, that Pearson was disorganized, and that he seemed “paranoid” about other people, sometimes thinking he was being followed or watched. Pearson reported a belief that he had acquired special powers and that he could use more of his brain than other people could. Pearson reported spending money impulsively, including \$37,000 over a seven-week period, during which time he wrote \$5,000 in bad checks and borrowed to his credit limit.⁸³

¶ 52 Greg also told Dr. Silverglat that Pearson was absent-minded and had difficulty finding food to eat in their home. Greg reported that on one occasion, Pearson put food in the oven, forgot it was there, and left to purchase food because he could not find anything to eat. Pearson later returned to find their apartment filled with smoke from the burning food in the oven. Pearson told Dr. Silverglat that he had begun carrying a notebook and writing down his intentions so that he would remember what activity he was pursuing.⁸⁴ Dr. Silverglat noted:

[Pearson’s] short temper has gotten him into some trouble. He states he saw another man looking at his girlfriend’s bottom and beat him up for it. He also assaulted the owner of a dog in the neighborhood. He readily admits to having driven his Corvette at 160-170 mph and does not believe he had any difficulty handling the vehicle. He admits he doesn’t really give any thought to any painful consequences that may ensue from his actions.⁸⁵

¶ 53 Dr. Silverglat also noted that both Pearson and Greg reported that Pearson’s tolerance for alcohol had changed and that Pearson seemed to become intoxicated from much smaller quantities than would previously have affected him. Pearson also reported that while he did not actively seek out marijuana, he would use it if it were offered to him.⁸⁶

¶ 54 Dr. Silverglat assessed Pearson as having a manic episode, moderately severe, verging on psychotic features, due to Zoloft and/or head injury; cognitive deficit including significant amnesia, presumably due to the industrial accident; an unknown

⁸³ Ex. 17 at 1-2.

⁸⁴ Ex. 17 at 2.

⁸⁵ Ex. 17 at 3.

⁸⁶ Ex. 17 at 3.

cerebral injury from the industrial accident; an inability to comply with prescribed medications; and abuse of marijuana and alcohol.⁸⁷ Dr. Silverglat informed Pearson and Greg that Pearson was experiencing a manic episode and that it was important for Pearson to take the condition seriously and to take his medication precisely as prescribed. Dr. Silverglat recommended that Pearson not drive until the episode resolved. Dr. Silverglat further recommended that Pearson abstain from marijuana and alcohol for two weeks, to reduce his intake of Zoloft for four days and then cease taking it entirely, and to take his carbamazepine prescription on a strict schedule.⁸⁸

¶ 55 Greg testified that prior to the industrial accident, Pearson was a reliable, dependable person. He stated that although Pearson drank alcohol prior to the industrial accident, he did not drink with the same frequency or amount as he did afterward.⁸⁹ Greg testified that Pearson began drinking excessively about a year or year and a half after the industrial accident.⁹⁰ He further testified that Pearson's behavior changed drastically after the industrial accident. Pearson became unkind, inconsiderate, and dishonest. Pearson began to steal and used foul language. Pearson also seemed very depressed and stayed at home to watch television, although he had previously been an active person who enjoyed activities such as hunting, fishing, and golfing. Greg stated that at other times, Pearson would have a "scary" amount of energy. Pearson would go from not wanting to exercise to working out to the point of exhaustion. Pearson also exhibited drastic mood swings and sometimes became violent.⁹¹

¶ 56 Jim also testified that Pearson was "very different" after the industrial accident. He was hyper on some days and withdrawn on others. Sometimes he displayed no emotion.⁹²

¶ 57 On October 16, 1996, Dr. Silverglat noted that Pearson had not strictly adhered to his recommendations: although he reported faithfully taking carbamazepine, he continued to use alcohol and marijuana. He also continued to drive and had been involved in two accidents in the previous nine days. Pearson reported continued impulsivity with money. Dr. Silverglat assessed Pearson as still undergoing a manic episode with only slight improvement. Dr. Silverglat again recommended that Pearson

⁸⁷ Ex. 17 at 4.

⁸⁸ Ex. 17 at 5.

⁸⁹ Trial Test.

⁹⁰ Greg Dep. 45:4-14.

⁹¹ Trial Test.

⁹² James Dep. 24:11-17.

not drive and that he abstain from using alcohol and marijuana. He increased Pearson's carbamazepine dosage.⁹³

¶ 58 On October 23, 1996, Dr. Harrison saw Pearson for a neuropsychological follow-up examination. Dr. Harrison noted that Pearson had requested the appointment because of "building concerns regarding his condition, treatment, and outcome." Dr. Harrison noted that Pearson's mental and cognitive status appeared improved, and that Pearson was calmer, less distractible, and showed improved reasoning. Pearson's impulsivity had improved, but he continued to experience negative social consequences from his behavior. Pearson reported using better judgment concerning driving and better compliance with his prescription medication regimen, but expressed concern that he was unable to get along with other people. Dr. Harrison observed that at the time of this appointment, Pearson appeared to need assistance in sorting through the things that were happening in his life.⁹⁴

¶ 59 On October 31, 1996, Dr. Silverglat noted that Pearson reported a decrease in feelings of euphoria or over-stimulation. Pearson reported spending approximately \$50,000 during the manic episode and regretted the spending spree. Dr. Silverglat continued the carbamazepine and noted:

I told Scott it is still . . . not known or knowable whether his manic episode resulted from Zoloft or from the head injury, neither one can be truly ruled out. If the head injury were the sole etiology, then he might expect further manic symptoms to occur, possibly within as little as two months if he stops the medicine. Even if it was triggered by Zoloft, I cannot offer any positive reassurance that the symptoms would remain in remission should he stop the medications. I therefore recommended that he continue for a minimum of 12 months but he finds that pretty discouraging.⁹⁵

¶ 60 On November 8, 1996, Maynard denied payment for Pearson's August 26-27, 1996, hospitalization, contending that it did not arise as a result of his industrial accident, and further contending that Pearson did not obtain preauthorization to change treating physicians.⁹⁶ Maynard also wrote to DiRe and demanded that Pearson present

⁹³ Ex. 17 at 6.

⁹⁴ Ex. 23 at 5-6.

⁹⁵ Ex. 17 at 7.

⁹⁶ Deposition Ex. N at 142.

himself for an independent medical examination (IME) with Dr. McElhinny on December 2, 1996.⁹⁷

¶ 61 On November 18, 1996, Dr. Harrison reported that he and Dr. Silverglat had met with Hickey to discuss “urgent concerns” about Pearson’s case. Hickey related that Pearson was taking Zoloft against medical advice and that he was abusing substances to the point of blackouts, took part in a physical altercation, and continued to drive against medical advice. Pearson’s family also expressed concern about Pearson’s safety. Dr. Harrison stated:

The decision today was to pursue and [sic] intervention with Scott to include the choice of a daily commitment to participating in the Bridges Program (should he be approved) or inpatient hospitalization. There appears to be a significant loss of control and accountability, particularly in efforts to get the medications on board. Based on the most recent information I support this level of intervention and believe that we really are dealing with an individual who is a danger to himself or others, based on past behavior and current risk.⁹⁸

¶ 62 On November 27, 1996, Dr. Silverglat noted, “Scott’s problem grows more complex at the same time his mania is settling down.” Dr. Silverglat noted that Pearson reported that he was now sleeping approximately 16 hours per day. Dr. Silverglat thought Pearson might be experiencing a post-manic depression. Dr. Silverglat assessed Pearson with persistent cognitive deficit with significant amnesia due to head injury. Dr. Silverglat also noted that Pearson had developed dermatitis which was probably due to the carbamazepine and recommended that Pearson taper off the drug.⁹⁹

¶ 63 On December 2, 1996, Joseph K. McElhinny, Psy.D., conducted a neuropsychological examination of Pearson.¹⁰⁰ Dr. McElhinny is a clinical psychologist specializing in neuropsychology.¹⁰¹ He is currently in private practice as a clinical psychologist.¹⁰² The examination’s purpose was to describe Pearson’s current neuropsychologic functioning as it related to Pearson’s industrial accident. Dr. McElhinny noted that Pearson reported some depression, but that Pearson exhibited “good energy” throughout the evaluation although “[t]here were some signs of variable

⁹⁷ Deposition Ex. N at 143-44.

⁹⁸ Ex. 23 at 7.

⁹⁹ Ex. 17 at 8-9.

¹⁰⁰ Ex. 15.

¹⁰¹ McElhinny Dep. 4:6-7.

¹⁰² McElhinny Dep. 9:6-8.

effort in his performance and he seemed to be prone to some mild behavioral impulsivity.”¹⁰³

¶ 64 After reviewing Pearson’s medical records, Dr. McElhinny noted that Pearson remained in a coma for 17 days following his industrial accident and that a CT scan performed on November 22, 1995, indicated subdural fluid collections under both frontal lobes, right greater than left, with a mild compression of the frontal sulci. Dr. McElhinny also noted that Pearson was initially referred to Bridges for post-acute cognitive/neurologic rehabilitation.¹⁰⁴ Dr. McElhinny further noted:

Records indicate that his CT scans improved by 12/04/95, but “probable necrosis” was evident. He remained somewhat confused at that time. After his return to Community Hospital, he had difficulty following verbal instructions and deficits in memory and general knowledge were noted. He underwent occupational therapy and physical therapy. It was determined that the Community Bridges Program would be too rigorous for him on 01/04/96.¹⁰⁵

Dr. McElhinny testified that he had no opinion as to whether Bridges would have been too rigorous for Pearson on January 4, 1996.¹⁰⁶

¶ 65 Dr. McElhinny opined that Pearson had suffered “at least a mild traumatic brain injury” from his industrial accident. Dr. McElhinny found “residual weaknesses” and opined that Pearson would continue to improve for at least another six months. Dr. McElhinny found that Pearson’s neuropsychologic deficits suggested diffuse cognitive impairment, more posterior than anterior, and possibly more lateralized to the right hemisphere. Dr. McElhinny further noted that Pearson might be suffering from mild depression.¹⁰⁷ Dr. McElhinny believed that Pearson’s Zoloft prescription was responsible for the manic episodes.¹⁰⁸ Dr. McElhinny diagnosed Pearson with a mood disorder associated with the use of a serotonin re-uptake inhibitor, primarily manic features, which had seemingly resolved by the time of Dr. McElhinny’s examination.¹⁰⁹

¹⁰³ Ex. 15 at 2.

¹⁰⁴ Ex. 15 at 4.

¹⁰⁵ Ex. 15 at 4.

¹⁰⁶ McElhinny Dep. 33:6-11.

¹⁰⁷ Ex. 15 at 11.

¹⁰⁸ McElhinny Dep. 43:7-8.

¹⁰⁹ Ex. 15 at 12.

¶ 66 Dr. McElhinny testified that he did not diagnose Pearson with bipolar mood disorder at the time of his December 2, 1996, evaluation because he did not see evidence for it. Dr. McElhinny stated that bipolar mood disorder is not easy to diagnose and that it often requires multiple visits with a trained mental health professional to reach that diagnosis.¹¹⁰ Dr. McElhinny testified that he assumed Pearson did not have bipolar mood disorder on December 2, 1996; he diagnosed Pearson with a mood disorder that seemed to be aggravated by a serotonin re-uptake inhibitor.¹¹¹

¶ 67 Dr. McElhinny stated:

You know, if he had a bipolar mood disorder, I don't know where that came from, 'cause that was not part of my records, it was not part of what I reviewed, and it's not part of my knowledge about this patient.¹¹²

¶ 68 Dr. McElhinny opined that at the time he evaluated Pearson on December 2, 1996, Pearson's neuropsychological deficits were not significant enough to warrant an in-patient treatment program.¹¹³ Dr. McElhinny recommended that Pearson receive outpatient psychoeducation to address his cognitive weaknesses for 8 to 12 sessions. Dr. McElhinny further found that Pearson was able to return to work, particularly to a familiar job, but that Pearson should avoid taking on novel vocational duties, and that Pearson was probably not capable of performing the mental tasks necessary to return to his job as a roofing foreman. Dr. McElhinny suggested that a less demanding job with Missoula Sheet Metal would be rehabilitative for Pearson's cognitive weaknesses. Dr. McElhinny further noted that Pearson should initially return to work part-time.¹¹⁴ Dr. McElhinny opined that in December 1996, Pearson was a competent person, and that he had the capacity to understand his actions and their consequences.¹¹⁵

¶ 69 Dr. McElhinny had no opinion as to whether Pearson's depression was a result of his brain injury.¹¹⁶ Dr. McElhinny also had no opinion as to whether Pearson's industrial

¹¹⁰ Trial Test.

¹¹¹ McElhinny Dep. 64:10-19.

¹¹² McElhinny Dep. 76:16-20.

¹¹³ Trial Test.

¹¹⁴ Ex. 15 at 12.

¹¹⁵ McElhinny Dep: 73:18 – 74:1.

¹¹⁶ McElhinny Dep. 50:9-15.

injury contributed to his alcohol abuse.¹¹⁷ He did find that Pearson's manic behaviors exacerbated his alcohol abuse.¹¹⁸

¶ 70 On December 18, 1996, Maynard wrote to DiRe and enclosed a copy of Dr. McElhinny's report. Maynard asked DiRe to direct Pearson to contact Dr. Robert A. Velin for psychoeducation.¹¹⁹

¶ 71 On December 18, 1996, Dr. Silverglat noted that Pearson had successfully tapered off of carbamazepine; however, Pearson was now depressed. Dr. Silverglat assessed Pearson as having a mood disorder, secondary to injury and to Zoloft.¹²⁰

¶ 72 On January 10, 1997, Dr. Silverglat reported that Pearson's mood had continued to drop: "[H]e experiences moderately severe sadness and psychomotor slowing. He has an increased need for sleep, has no enthusiasm for anything at all." Dr. Silverglat assessed Pearson as having a mood disorder with bipolar characteristics, secondary to head injury.¹²¹

¶ 73 Pearson did not remain in touch with Blackman. Blackman sent him letters on January 16 and 29, 1997, indicating that she needed to meet with him to discuss his case.¹²²

¶ 74 On January 31, 1997, Maynard again wrote to DiRe and advised DiRe that Pearson had not followed through on arranging psychoeducation sessions. Maynard further noted that Pearson had failed to stay in contact with Blackman. Maynard stated, "It is therefore clear that Mr. Pearson has begun a course of ignoring the insurer." He then put DiRe on notice pursuant to § 39-71-1032, MCA, that Valor would terminate Pearson's benefits unless he contacted Blackman by February 5, 1997. Maynard further advised that he would take steps to terminate Pearson's benefits if Pearson failed to follow through on psychoeducation sessions. Finally, Maynard stated:

[T]here have been two or three episodes where Mr. Pearson has incurred significant charges in connection with the Bridges Program. Dr. McElhinny and other health care professionals have made it clear that Mr. Pearson is not an appropriate candidate for the Bridges Program. Any

¹¹⁷ McElhinny Dep. 51:2-7.

¹¹⁸ McElhinny Dep. 51:8-13.

¹¹⁹ Ex. 8 at 31.

¹²⁰ Ex. 17 at 10.

¹²¹ Ex. 17 at 11.

¹²² Ex. 32 at 13-14.

further charges incurred in connection with the Bridges Program without prior authorization will not be paid.¹²³

¶ 75 On February 5, 1997, Maynard wrote to DiRe and advised him that Pearson had failed to show for an appointment with Dr. Schutte for a maximum medical improvement (MMI) determination. Maynard directed DiRe to tell Pearson to make an appointment with Dr. Schutte, or else Maynard would terminate Pearson's benefits pursuant to § 39-71-1106, MCA, for Pearson's "global refusal to cooperate."¹²⁴ Shortly thereafter, Maynard apparently learned that Pearson had gone on vacation and on February 20, 1997, he advised DiRe that, now that Pearson had returned, he needed to "immediately begin his psychoeducation."¹²⁵

¶ 76 On February 21, 1997, Blackman issued a status report regarding Pearson's case in which she noted that Pearson had undergone a neuropsychological evaluation and psychiatric treatment since her last report. Blackman noted that Dr. McElhinny recommended that Pearson receive out-patient treatment and return to productive vocational activity. She noted that Dr. McElhinny recommended that Pearson work on a part-time basis in an area familiar to him, noting that a less demanding position with his time-of-injury employer would be an appropriate job placement. Blackman further noted that Dr. Silverglat was attempting to stabilize Pearson's moods by adjusting his medications.¹²⁶ Blackman stated that she had contacted Pearson's time-of-injury employer and learned that no suitable position existed with the company. She noted that Pearson had few transferable skills within his physical restrictions, but expressed hope that Dr. Schutte might be willing to lessen Pearson's restrictions which would expand his occupational possibilities. Blackman further noted that while Pearson had not participated consistently in his vocational rehabilitation, she believed his psychiatric treatment might improve his cooperation after his mood stabilized and his cognitive deficits were addressed.¹²⁷ Blackman noted that she intended to develop job analyses for Dr. Schutte's review, and that she intended this to lead to a rehabilitation plan with immediate job placement.¹²⁸

¶ 77 On March 13, 1997, Dr. Schutte declared Pearson at MMI from his industrial injury and assigned him a 10% whole person impairment rating.¹²⁹ Dr. Schutte opined

¹²³ Ex. 8 at 35-36.

¹²⁴ Ex. 8 at 39.

¹²⁵ Ex. 8 at 40.

¹²⁶ Ex. 32 at 18.

¹²⁷ Ex. 32 at 19.

¹²⁸ Ex. 32 at 20.

¹²⁹ Pretrial Order, Uncontested Facts, at 2.

that Pearson could return to work in some capacity and recommended a functional capacity assessment to define his limitations.¹³⁰

¶ 78 On March 19, 1997, Blackman informed Roller that Pearson had again become non-compliant and had failed to contact her.¹³¹

¶ 79 On March 24, 1997, Maynard wrote to Blackman and enclosed a copy of a 14-day notice of termination of benefits which he had sent to Pearson. Maynard told Blackman that he doubted Pearson would cooperate and he asked her to prepare job analyses.¹³²

¶ 80 On March 27, 1997, Dr. Silverglat noted that Pearson had stopped taking his current prescription because it made him drowsy. Although Pearson reported feeling better without the medication, Dr. Silverglat saw no improvement in Pearson's thinking, behavior, or mood. Dr. Silverglat talked to Pearson about the likelihood of a recurrence of symptoms, but Pearson did not want to resume medication. Dr. Silverglat assessed Pearson as suffering "Mood disorder (bipolar) due to head injury."¹³³

¶ 81 On March 28, 1997, Blackman wrote to Pearson. She stated that she intended to identify light- to medium-duty jobs and to submit job analyses to Dr. Schutte. Blackman further stated that she would recommend eight weeks of job placement assistance only if she had "a strong conviction" that he would cooperate.¹³⁴

¶ 82 On April 7, 1997, Blackman submitted job analyses to Dr. Schutte.¹³⁵ On April 15, 1997, she submitted those job analyses to Dr. Silverglat, noting that Dr. Schutte had approved all but one position which exceeded Pearson's lifting restrictions. She asked Dr. Silverglat whether he concurred with Dr. Schutte's recommendations and asked him whether Pearson could re-enter employment at that time and if not, what type of treatment plan he would recommend to make Pearson employable in the future.¹³⁶

¶ 83 Linderman testified that she never questioned the suitability of the jobs Blackman identified for Pearson in light of his psychological problems. Linderman did not know

¹³⁰ Ex. 18 at 33-34.

¹³¹ Ex. 32 at 23.

¹³² Ex. 32 at 24-25.

¹³³ Ex. 17 at 15.

¹³⁴ Ex. 32 at 26.

¹³⁵ Ex. 32 at 27.

¹³⁶ Ex. 32 at 28-29.

which factors Blackman considered in submitting the job analyses, but Linderman believed Blackman would have taken all of Pearson's conditions into account.¹³⁷

¶ 84 On April 9, 1997, Maynard wrote to Dr. McElhinny and stated that: Pearson had attended only one psychoeducation session and had failed to follow through with additional appointments; Pearson skipped appointments with Dr. Schutte until Valor threatened to terminate his benefits; Dr. Schutte had found Pearson at physical MMI; Pearson had failed to cooperate with vocational rehabilitation efforts; and Pearson was now refusing to take prescription medication. Maynard asked Dr. McElhinny if, in light of Pearson's conduct, he had an opinion as to whether Pearson had reached maximum psychological improvement.¹³⁸

¶ 85 On April 14, 1997, Dr. McElhinny responded to Maynard and stated that he found it "unfortunate" that Pearson had failed to cooperate with medical and vocational rehabilitation efforts. Dr. McElhinny noted that Pearson was 17 months post-accident, and appeared to be making his own decisions. Dr. McElhinny opined that it was unlikely that Pearson would experience any additional, measurable spontaneous recovery from his head injury. Dr. McElhinny opined that Pearson was therefore at maximum psychological improvement, and recommended that Pearson be urged to return to full-time employment as soon as possible.¹³⁹

¶ 86 Dr. McElhinny testified that he opined that Pearson had reached maximum psychological improvement based on Maynard's representation that Pearson had failed to cooperate with treatment. Dr. McElhinny had not seen Pearson since December 2, 1996.¹⁴⁰ Dr. McElhinny further testified that on April 14, 1997, Pearson probably would have benefited from primary medical treatment if he would have cooperated with treatment at that time.¹⁴¹

¶ 87 Linderman testified that Pearson never received an impairment rating for any cognitive deficits or mood disorder.¹⁴²

¶ 88 On April 16, 1997, Maynard wrote to DiRe and enclosed Dr. McElhinny's April 14, 1997, report. Maynard stated that Dr. Schutte had previously found Pearson at physical MMI. Maynard opined that it was "time to resolve this case" and asked DiRe to tender

¹³⁷ Trial Test.

¹³⁸ Ex. 15 at 16-17.

¹³⁹ Ex. 15 at 18.

¹⁴⁰ McElhinny Dep. 62:13 – 63:11.

¹⁴¹ McElhinny Dep. 65:9-14.

¹⁴² Trial Test.

an offer. Maynard noted that Pearson had again failed to cooperate with vocational rehabilitation and Valor was therefore terminating Pearson's benefits pursuant to § 39-71-1032, MCA. Maynard further advised that, due to Pearson's failure to cooperate with medical treatment, Valor was also terminating Pearson's benefits pursuant to § 39-71-1106, MCA.¹⁴³

¶ 89 On April 22, 1997, DiRe proposed a settlement. Given Pearson's medical impairment (10%), wage loss (20%), and restrictions (5%), DiRe contended that Pearson had a 35% permanent partial disability (PPD) claim and that Pearson would be entitled to PPD benefits in the amount of \$46,550. DiRe further contended that Pearson was entitled to rehabilitation benefits totaling \$39,520. DiRe therefore demanded \$86,070 in a lump sum to settle Pearson's claim.¹⁴⁴

¶ 90 On April 29, 1997, Maynard responded to DiRe's demand letter. Maynard stated that DiRe had miscalculated Pearson's PPD rate by using the temporary total disability rate amount. Maynard contended that at the correct weekly rate, the total PPD exposure totaled \$23,275. Maynard further disputed DiRe's rehabilitation value, noting that Blackman had constructed a plan with a value of \$3,040. Maynard contended that Valor's minimum exposure was \$26,315. Maynard tendered an offer of \$30,000 as a full and final compromise settlement, with the insurer receiving credit for any PPD paid until settlement.¹⁴⁵ Maynard testified that he arrived at his offer of \$30,000 by adding eight weeks of rehabilitation benefits and job placement and an "enhancer" to Valor's maximum PPD exposure.¹⁴⁶ Maynard testified that DiRe made it clear that Pearson wanted to settle his claim.¹⁴⁷

¶ 91 On May 2, 1997, Blackman submitted a rehabilitation plan and closing report for Pearson's case. She noted that Pearson was generally non-compliant with vocational rehabilitation efforts, and that she would support eight weeks of job placement assistance only if Pearson met certain requirements to indicate his willingness to comply.¹⁴⁸

¹⁴³ Ex. 8 at 45-46.

¹⁴⁴ Ex. 8 at 47-48.

¹⁴⁵ Ex. 8 at 49-50.

¹⁴⁶ Trial Test.

¹⁴⁷ Trial Test.

¹⁴⁸ Ex. 32 at 32-33.

¶ 92 Greg testified that at some point, he heard that DiRe was trying to settle Pearson's claim for \$70,000. He became concerned because he did not believe DiRe was capable of negotiating a good settlement for Pearson.¹⁴⁹ Greg stated:

[Pearson] would have taken 50 bucks at the time. . . . In his state of mind he would have taken anything. It didn't matter to him. You could have talked a million or you could have talked 20,000 bucks, [Pearson] would have said okay. . . . [H]e couldn't handle anything like that. I don't think he can handle that today. [DiRe] basically did what [Pearson] made him do.¹⁵⁰

¶ 93 On May 6, 1997, Roller informed Pearson that Valor had terminated his benefits pursuant to a 14-day notice sent on April 16, 1997. Roller advised Pearson that Valor had converted his benefit payments to PPD benefits based on Dr. Schutte's 10% impairment rating. Roller stated that Pearson would receive PPD benefit payments for 35 weeks or until his case settled, whichever occurred first, and further stated that if Pearson settled his claim, Valor would take credit for any PPD already paid.¹⁵¹

¶ 94 On May 9, 1997, Pearson, represented by DiRe, signed a petition for full and final compromise of his workers' compensation claim.¹⁵² Greg recalled that at the time of the settlement, he urged Pearson to get a second opinion before agreeing to the settlement, but Pearson did not do so.¹⁵³ Greg testified:

I felt, and [DiRe] knew I felt this, that [DiRe] was a young attorney. He hadn't been practicing very long and I really don't think he was familiar with this type of a case. He pretty much was dealing with smaller lawsuits

And I even suggested to [Pearson] at that time that perhaps we should find another attorney [Pearson] didn't want to do that. . . . He had kind of put his faith in [DiRe]. . . .

But when it came down to something serious like this . . . , I just felt like [DiRe] wasn't the guy for it. . . . But [Pearson], at that time, was very

¹⁴⁹ Greg Dep. 25:16-23.

¹⁵⁰ Greg Dep. 26:9-17.

¹⁵¹ Ex. 8 at 51.

¹⁵² Pretrial Order, Uncontested Facts, at 2.

¹⁵³ Trial Test.

irrational. . . . [T]here was no way he could tell that [DiRe] wasn't the best guy in the world. . . .¹⁵⁴

¶ 95 On May 27, 1997, Maynard sent the Petition for Settlement and settlement recap sheet to the Department of Labor and Industry for approval.¹⁵⁵

¶ 96 On June 12, 1997, the Department approved the Petition for Full and Final Compromise Settlement. The petition stated, in pertinent part, that the parties agreed to settle the claim for \$36,000 minus any PPD paid since May 3, 1997, with medical benefits remaining open.¹⁵⁶

¶ 97 Jim testified that he had not known that Pearson was settling his workers' compensation claim until after the fact.¹⁵⁷

¶ 98 Jim testified that he became aware of Pearson's inappropriate behavior when Pearson moved to Anaconda in approximately 1997. Jim testified that Pearson has been ejected from business establishments, but Pearson did not seem embarrassed about his behavior.¹⁵⁸ Pearson also no longer participated in family activities he had previously enjoyed.¹⁵⁹

¶ 99 Pearson stated that he does not know how the settlement came to be valued at \$36,000.¹⁶⁰ Pearson testified that he was aware that DiRe sent Valor a settlement demand letter, but he does not think he knew that the original demand was for \$86,070.¹⁶¹ He testified that he does not know what DiRe discussed with Valor in negotiating the settlement, and that at that time, he was "severely impaired" because of his extreme manic and depressive moods.¹⁶²

¶ 100 Pearson testified that when DiRe gave him the settlement check, Pearson crumpled it and threw it in the trash; DiRe retrieved it.¹⁶³ Pearson believes he then

¹⁵⁴ Greg Dep. 18:4 – 19:2.

¹⁵⁵ Ex. 8 at 56-57.

¹⁵⁶ Ex. 13 at 1-2.

¹⁵⁷ James Dep. 13:1-2.

¹⁵⁸ James Dep. 14:16 – 15:20.

¹⁵⁹ James Dep. 16:1-11.

¹⁶⁰ Pearson Dep. 62:4-7.

¹⁶¹ Pearson Dep. 59:3-18.

¹⁶² Pearson Dep. 59:19 – 60:11.

¹⁶³ Pearson Dep. 65:16-19.

cashied the check and spent the money.¹⁶⁴ Pearson stated that he initially discarded the check because he was angry about the settlement.¹⁶⁵

¶ 101 Pearson estimated that he spent his settlement award in approximately 10 days.¹⁶⁶ Greg stated that when Pearson received his settlement, he spent it in two or three weeks.¹⁶⁷ Greg stated that Pearson left extravagant tips in restaurants, and bought expensive alcohol, furniture, and clothing with the settlement funds.¹⁶⁸

¶ 102 On July 20, 2001, Pearson was seen at First Health Services of Montana in Billings. He reported that he had been treated for bipolar mood disorder and that he had severe manic episodes approximately every six months and problems with impulsivity. Pearson stated that this condition occurred after a severe automobile accident six years previously. He reported that he had been suicidal in January 2001, had quit his last job due to a manic episode, and that he had been arrested for assaulting a police officer.¹⁶⁹

¶ 103 Since approximately 2002, Pearson has lived with his mother Lorraine Johnson.¹⁷⁰ He helps her with household chores and makes sure she takes her medication.¹⁷¹ He also does the cooking.¹⁷² Johnson testified that since the industrial accident, Pearson has gone through periods of time where he exhibited behavior which she described as “manic depressant.”¹⁷³ Johnson further testified that Pearson developed a short temper after the industrial accident.¹⁷⁴ She explained:

He would just go off the top of his head, he would scream, cry. Cried a lot. And sometimes you couldn't even talk to him because he was just so into it, so irate and everything, you had a hard time calming him down. . . . I would learn how . . . to try to calm him down He could go to bed and he could sleep it off, then he'd feel better when he got up. But he also,

¹⁶⁴ Pearson Dep. 66:1-2.

¹⁶⁵ Pearson Dep. 66:3-8.

¹⁶⁶ Trial Test.

¹⁶⁷ Greg Dep. 31:14-23.

¹⁶⁸ Greg Dep. 31:25 – 32:16.

¹⁶⁹ Ex. 30.

¹⁷⁰ Johnson Dep. 23:20-24.

¹⁷¹ Johnson Dep. 37:3-23.

¹⁷² Johnson Dep. 40:8-12.

¹⁷³ Johnson Dep. 22:4.

¹⁷⁴ Johnson Dep. 52:5-19.

when he was in a mania, he would go to bed for three or four days. Get up to go potty and eat, but he was a mess.¹⁷⁵

Johnson testified that Pearson had most recently had an episode about a week and a half prior to her deposition, which was taken October 26, 2010.¹⁷⁶

¶ 104 Johnson testified that Pearson does not have a valid driver's license; it has been suspended for multiple DUIs.¹⁷⁷ Johnson stated that Pearson "has a tendency to take my car keys" without her permission. She testified that every time Pearson takes her car, he apologizes and says he will not do it again, but he continues to do so.¹⁷⁸

¶ 105 In January 2004, Pearson sought treatment at the Western Montana Mental Health Center, apparently at his own initiative and without using his medical benefits from Valor.¹⁷⁹ Pearson reported depression¹⁸⁰ and "mood cycling."¹⁸¹ He was diagnosed with bipolar disorder secondary to head injury.¹⁸² Pearson reported attempts to maintain sobriety, with "disastrous" consequences from drinking alcohol. He reported distractibility and difficulty following through with plans.¹⁸³ Over the course of the next several years, Pearson's treatment records reflect ongoing difficulties with depression, mania, and alcohol abuse.¹⁸⁴

¶ 106 On February 1, 2004, Pearson qualified for Social Security Disability based on mental illness and cognitive deficits.¹⁸⁵

¶ 107 On November 23, 2004, Bill S. Rosen, M.D., saw Pearson for a consultation at Pearson's request. Pearson reported alcohol abuse, difficulty planning and maintaining attention, decreased speed of processing, distractibility, short-term memory deficits, short temper, depression, fatigue, sleep disruption, and lack of motivation. On examination, Dr. Rosen found Pearson to have short-term memory deficits, some loss

¹⁷⁵ Johnson Dep. 22:7-21.

¹⁷⁶ Johnson Dep. 22:23 – 23:7.

¹⁷⁷ Johnson Dep. 46:1-14.

¹⁷⁸ Johnson Dep. 38:8-23.

¹⁷⁹ Ex. 29; Trial Test.

¹⁸⁰ Ex. 29 at 4.

¹⁸¹ Ex. 29 at 5.

¹⁸² Ex. 29 at 5.

¹⁸³ Ex. 29 at 6.

¹⁸⁴ See, e.g., Ex. 29 at 32.

¹⁸⁵ Pretrial Order, Uncontested Facts, at 2.

of balance and fine coordinating movements, and other objective medical findings.¹⁸⁶ Dr. Rosen informed Pearson that he would only be willing to prescribe certain medications if Pearson underwent substance abuse counseling. Dr. Rosen offered to establish ongoing care for Pearson if Pearson complied with substance abuse counseling and began to develop a vocational rehabilitation plan.¹⁸⁷

¶ 108 On April 28, 2006, clinical psychologist Julie Hergenrather, Ph.D., ACT, wrote to Dr. Rosen. She had recently seen Pearson and recommended that he return to Dr. Rosen for follow-up care. She noted that Pearson was 10 years post traumatic brain injury and that he complained of lethargy, lack of motivation, significant depression, and social withdrawal, and that he was susceptible to severe manic episodes approximately every three to five weeks. Dr. Hergenrather noted that Pearson's mania led to severe rages, that he had been involved in physical altercations, and that his difficulties were exacerbated by frequent alcohol use. She further noted that Pearson suffered from significant cognitive deficits including initiation and sustaining effort, problem solving, short-term memory issues, and judgment difficulties. Dr. Hergenrather opined that Pearson was not a good candidate for cognitive behavioral therapy because of the severity of his symptoms, but suggested that he might be a candidate for Bridges or a similar program.¹⁸⁸

¶ 109 On August 15, 2007, Jim was appointed the conservator for Pearson's workers' compensation claim.¹⁸⁹ Earlier, he was appointed the conservator for Pearson's Social Security benefits.¹⁹⁰ Johnson testified that Jim is responsible for the conservatorship "[b]ecause [Pearson] has no conception of money."¹⁹¹

¶ 110 On October 15, 2008, Pearson filed his Petition for Trial in this case.¹⁹²

¶ 111 On May 27, 2009, clinical psychologist/neuropsychologist Paul Bach, Ph.D., ABMP, ACFE, ABPDC, performed a medical record review of Pearson's case on request of Pearson's counsel.¹⁹³ Dr. Bach has Master's and Doctorate degrees in clinical psychology.¹⁹⁴ He is a neuropsychologist at Montana Neurobehavioral

¹⁸⁶ Ex. 28 at 2-3.

¹⁸⁷ Ex. 28 at 4.

¹⁸⁸ Ex. 35 at 4.

¹⁸⁹ Ex. 3.

¹⁹⁰ James Dep. 7:22-25.

¹⁹¹ Johnson Dep. 62:9-25.

¹⁹² Docket Item No. 1.

¹⁹³ Deposition Ex. J.

¹⁹⁴ Bach Dep. 15:3-7.

Specialists.¹⁹⁵ Dr. Bach reported that counsel asked him: Did a mistake or error of fact occur in the settlement of Pearson's case; was Pearson competent to enter into the settlement agreement; and what caused Pearson's neuropsychological syndrome. Dr. Bach reviewed selected portions of Pearson's medical records, including the reports of Drs. McElhinny and Silverglat, and the transcript of Dr. McElhinny's May 20, 2009, deposition. Dr. Bach opined:

[A] bipolar major affective disorder secondary to traumatic head injury was diagnosed and being treated by Dr. Silverglat at the time of settlement, and was recognized by Dr. Harrison in the months prior to settlement, but was said to be by Dr. McElhinny only a single episode, due to missed medication. Treating psychiatrist Dr. Silverglat's opinion that a 50/50 chance of return of mania is contradictory with any opinion that the patient was at maximum medical improvement.

The errors in fact were the nature and extent of the claimant's condition (mood disorder with bipolar features caused by a head injury) as it existed at the time of settlement. Dr. McElhinney [sic], and therefore both parties, acted in ignorance of an injury that existed at the time of the settlement. Dr. Silverglat's opinion constitutes substantial credible evidence to support a finding of continued psychological impairment secondary to the head injury.

. . . .

It is my professional opinion that . . . [Pearson was] . . . unable to understand . . . his Worker's [sic] Compensation settlement agreement.

. . . Mr. Pearson's cognitive deficits and bipolar disorder were caused by the motor vehicle accident.¹⁹⁶

¶ 112 Dr. Bach opined that Pearson had a bipolar major affective disorder secondary to his traumatic head injury, and that this condition existed at the time Pearson settled his claim.¹⁹⁷ Dr. Bach testified that he believes both parties were mutually mistaken as to the existence of Pearson's bipolar disorder because neither DiRe nor Dr. McElhinny

¹⁹⁵ Bach Dep. 15:20-25.

¹⁹⁶ Deposition Ex. J.

¹⁹⁷ Bach Dep. 44:5-9.

mentioned the condition in any writings, and Dr. McElhinny later denied any knowledge of the condition.¹⁹⁸

¶ 113 Dr. Bach testified that, based on his medical records review, he did not believe Pearson had reached MMI for his bipolar mood disorder as of December 2, 1996.¹⁹⁹ Dr. Bach stated that people with bipolar mood disorders are typically non-compliant with their medications.²⁰⁰ He further testified that it is very typical for such people to have legal problems because of aggressiveness and impulsivity.²⁰¹ Dr. Bach opined that in cases such as Pearson's, where both a mood disorder and cognitive deficits are present, the combined effects are exponential.²⁰² Dr. Bach opined that, in light of the medical records he had reviewed, he did not believe Pearson had the ability to understand the settlement agreement at the time he entered into it.²⁰³

¶ 114 Dr. Bach testified:

Q. What portions of the multiple interacting components of the Workers' Compensation settlement unit do you believe that Scott Pearson was unable to understand or knowingly, knowledgeably agree to?

A. It's a multi-page contract.

Q. Yes.

A. We know he had cognitive deficits, as measured by Dr. McElhinny, we know he suffered from a Bipolar Disorder secondary to head injury, as diagnosed by Dr. Silverglat, and it is my professional judgment that a person suffering from those two disorders is unlikely to fully understand that complex legal document.²⁰⁴

¶ 115 Pearson testified that he has not successfully held a job since his industrial accident. Pearson estimated that he has attempted six or eight different jobs. He stated that he lost a job waiting tables because he was unable to master the computer system. At another food service job, Pearson became upset at a patron and physically

¹⁹⁸ Bach Dep. 43:4 – 44:4.

¹⁹⁹ Trial Test.

²⁰⁰ Trial Test.

²⁰¹ Trial Test.

²⁰² Trial Test.

²⁰³ Trial Test.

²⁰⁴ Bach Dep. 48:3-14.

ejected him from the establishment. Pearson then left the restaurant and never returned. In another instance, Pearson quit because he did not like the way his employer paid other workers. In another instance, Pearson worked as a salesperson of manufactured homes, but was unsuccessful in selling anything; he left the job after refusing to negotiate a price at the direction of his supervisor.²⁰⁵ At one point, Jim hired Pearson to work in Jim's restaurant – a decision which Jim characterized as “a disaster.”²⁰⁶ Jim testified that Pearson took money from the till and gave it to patrons.²⁰⁷ Pearson worked for Jim for approximately two weeks.²⁰⁸

¶ 116 Pearson testified that since the industrial accident, he has lost his friends and estranged many of his family members. Pearson testified that he has been banned from several business establishments in Missoula and Anaconda.²⁰⁹

¶ 117 Greg testified that recently, Pearson stole jewelry from their mother with the intention of pawning it.²¹⁰ Greg testified that Pearson seems unable to comprehend money, and that he quickly spends any money he gets on alcohol and gambling.²¹¹ Greg stated that prior to the industrial accident, Pearson was very cautious with money and that he was reluctant to spend it.²¹²

¶ 118 Greg testified that Pearson had good relationships with women prior to the industrial accident, but after the accident he began to treat women disrespectfully. Greg stated that Pearson also treats his relatives poorly and that when Pearson visits, Greg keeps an eye on him to make sure he does not steal items to pawn. Greg also stated that Pearson no longer enjoys hunting or fishing because he prefers to go to bars to drink and gamble.²¹³

¶ 119 Pearson explained that he “live[s] in the moment” and does not follow through with plans. He has memory problems. He noted that sometimes he picks up a telephone but cannot remember who he intended to call. Most days, he goes for a morning walk and then does household chores. Pearson spends his free time playing computer games, watching television, and doing crossword puzzles. He testified that

²⁰⁵ Trial Test.

²⁰⁶ James Dep. 24:20-25.

²⁰⁷ James Dep. 25:13-18.

²⁰⁸ James Dep. 26:20-21.

²⁰⁹ Trial Test.

²¹⁰ Trial Test.

²¹¹ Trial Test.

²¹² Trial Test.

²¹³ Greg Dep. 43:25 – 44:21.

his sleep patterns vary widely and he will go for several months sleeping up to 20 hours per day, and then for several months he will go several days without sleeping at all.²¹⁴

¶ 120 Jim testified that Pearson neglects to take his medication if he wants “to go out on the town,” because the medication “slow[s] him down.”²¹⁵ Jim stated that Pearson does not understand that he has to take the medication and that it’s for his benefit.²¹⁶

¶ 121 J. David Slovak, attorney with the firm of Lewis, Slovak, Kovacich & Marr, P.C., testified at trial. I found Slovak to be a credible witness. Slovak testified that his practice historically included workers’ compensation defense, and later evolved into representing claimants. Slovak testified that he has particular expertise in workers’ compensation law after over 30 years of representation, and that he has personally handled many workers’ compensation and other claims which involve traumatic brain injury or cognitive impairment.²¹⁷

¶ 122 Prior to trial, Pearson’s counsel asked Slovak to review Pearson’s case and the settlement and to render opinions based on that review. Slovak’s review focused on whether Pearson’s claim was appropriate for settlement at the time Pearson settled his claim. From his review of the medical records, Slovak formed the opinion that Pearson’s traumatic brain injury or closed head injury was not adequately considered at the time of settlement. Slovak believed that Pearson had not undergone a thorough vocational work-up at the time of settlement. Slovak stated that Pearson’s ongoing difficulties from his head injury were not taken into consideration in the vocational work-up.²¹⁸ Slovak testified that Pearson’s medical providers should have been asked for their opinions as to whether they believed Pearson was competent to enter into the settlement. Slovak further opined that Pearson was temporarily totally disabled and not permanently partially disabled at the time of the settlement.²¹⁹

¶ 123 Slovak opined that Pearson’s claim “absolutely” should not have been settled at the time Pearson entered into the settlement agreement. Slovak opined that, had Pearson been permanently partially disabled at the time the settlement agreement was signed, Maynard’s valuation of the benefits at approximately \$30,000 is correct.

²¹⁴ Trial Test.

²¹⁵ James Dep. 19:1-3.

²¹⁶ James Dep. 19:5-7.

²¹⁷ Trial Test.

²¹⁸ Trial Test.

²¹⁹ Trial Test.

However, Slovak further opined that if Pearson's claim were settled on a permanent total disability basis, its value, adjusted to 1997 dollars, is approximately \$350,000.²²⁰

¶ 124 Slovak testified that no examination had ever been conducted for the purpose of rendering an impairment rating for Pearson's traumatic brain injury, and therefore no impairment rating of the condition was ever assessed. Slovak also noted that, although Pearson had had approved job analyses which took his knee injury into account, it did not appear that any physician considered the job analyses while taking Pearson's traumatic brain injury into account. Slovak testified that in light of the medical records in evidence, at the very least, Pearson should have received an impairment rating for his mental impairment, and that this impairment rating would have at a minimum increased the valuation of Pearson's PPD claim.²²¹

CONCLUSIONS OF LAW

¶ 125 This case is governed by the 1995 version of the WCA since that was the law in effect at the time of Pearson's industrial accident.²²²

¶ 126 Pearson bears the burden of proving by a preponderance of the evidence that he is entitled to the benefits he seeks.²²³ Pearson has met his burden.

ISSUE ONE: Whether Petitioner's claims are barred by the applicable statutes of limitations, found at §§ 27-2-202, -203, MCA.

¶ 127 MIGA argues that Pearson's claim is barred as untimely under either § 27-2-202, MCA, or § 27-2-203, MCA. MIGA contends that since the Department approved the settlement agreement on June 12, 1997, Pearson had until June 12, 1999, to bring his action on the grounds of mutual mistake of fact. MIGA further contends that under § 27-2-202, MCA, Pearson had until June 12, 2005, to bring an action on the grounds of unconscionability as a basis for reopening the settlement.

¶ 128 Section 27-2-203, MCA, states: The period prescribed for the commencement of an action for relief on the ground of fraud or mistake is within 2 years, the cause of action in such case not to be deemed to have accrued until the discovery by the aggrieved party of the facts constituting the fraud or mistake. In *Whitcher v. Winter*

²²⁰ Trial Test.

²²¹ Trial Test.

²²² *Buckman v. Montana Deaconess Hosp.*, 224 Mont. 318, 321, 730 P.2d 380, 382 (1986).

²²³ *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).

Hardware Co., the Montana Supreme Court held that this limitation applies to petitions to reopen workers' compensation settlements.²²⁴

¶ 129 MIGA relies upon *Hayes v. State Compen. Ins. Fund* in arguing that Pearson's claim for reopening is barred under § 27-2-203, MCA. In *Hayes*, this Court held that the statute of limitations began to run from the time that the claimants filed district court claims related to the reopening of their occupational disease claims because by that date they had sufficient information and belief to cause them to document their case through medical examination and opinion. The Court rejected the claimants' argument that the statute did not begin to run until they obtained definitive medical advice.²²⁵ MIGA further notes that in *Rath v. St. Labre Indian School*, the Montana Supreme Court held that the statute of limitations begins to run when the facts are such that the party bringing the action would have discovered the mistake had he exercised ordinary diligence.²²⁶ MIGA argues that Pearson has set forth no facts which would have tolled the limitations period. MIGA further argues that, at the latest, the statute of limitations would have begun to run on February 1, 2006 – two years after Pearson qualified for Social Security disability benefits based on his mental illness.

¶ 130 Section 27-2-202(1), MCA, states: The period prescribed for the commencement of an action upon any contract, obligation, or liability founded upon an instrument in writing is within 8 years.

¶ 131 MIGA argues that Pearson's claim is time-barred under § 27-2-202, MCA, because he failed to file this petition within 8 years of the date the Department approved the settlement agreement.

¶ 132 Pearson sets forth several arguments in support of his position that his claim is not time-barred. Among other arguments, he relies upon § 28-2-201, MCA, which states, in pertinent part, that all persons are capable of contracting except minors, persons of unsound mind, and persons deprived of civil rights.

¶ 133 Under § 28-2-203, MCA, a contract of a person of unsound mind but not entirely without understanding, made before his incapacity has been judicially determined, is subject to rescission.

¶ 134 Pearson points to the medical records of the various doctors who treated him in 1996 and 1997 and argues that the doctors' notes paint a picture of someone incapable of competently agreeing to a settlement agreement. As set forth in the findings above,

²²⁴ *Whitcher*, 236 Mont. 289, 296-97, 769 P.2d 1215, 1219-20 (1989).

²²⁵ *Hayes*, 1999 MTWCC 7.

²²⁶ *Rath*, 249 Mont. 433, 439-40, 816 P.2d 1061, 1065 (1991).

Pearson was diagnosed with moderate to severe memory loss and some cognitive difficulties soon after his industrial accident. In early 1996, his sister expressed concern about his condition to Hickey. Soon afterward, Dr. Hahnstadt diagnosed him with depression and observed concentration and memory difficulties. As the year progressed, Hickey and Dr. Hahnstadt noted that Pearson's depression deepened. Dr. Hahnstadt diagnosed Pearson with a major depressive disorder and dementia, among other problems. After Pearson began taking Zoloft, he experienced a prolonged manic period, and Pearson cycled between severe manias and depressions throughout the summer of 1996. Pearson recalled "extreme euphoria" and explained that he acted in a "bizarre and radical" manner. Pearson's brothers Greg and Jim corroborate Pearson's recollection, both testifying that he behaved inappropriately, lost interest in interacting with friends and family, and exhibited poor or irrational decision making.

¶ 135 Other evidence of Pearson's erratic behavior during the latter half of 1996 includes incidents at his physical therapist's office, including an angry outburst and an incident in which he "mooned" staff and clients. Later, Pearson failed to attend a medical appointment because he became lost while driving, and a few days later, voluntarily committed himself to St. Patrick Hospital. Pearson had spent a few days in jail due to participating in an altercation. Dr. Stone noted that Pearson's family was concerned about his condition, although Pearson himself reported that he was happier than ever before.

¶ 136 Pearson was soon released from St. Patrick Hospital. He continued to have run-ins with the law and other difficulties. In October 1996, he informed Dr. Stone that he was spending money inappropriately and was unable to stop. Dr. Harrison described Pearson as experiencing an "intense manic episode" and noted that both Greg and DiRe characterized Pearson's behavior as "far from normal." Hickey noted that she and Dr. Schutte were concerned for Pearson's safety. Pearson informed Dr. Silverglat that he was spending money impulsively and had borrowed up to his credit limit. Dr. Silverglat reported that Pearson seemed to be unaware of negative consequences which might occur from his actions. He assessed Pearson as having a moderately severe manic episode verging on psychotic features.

¶ 137 Pearson continued to report impulsive spending, even as his manic episode appeared to be lessening. He reported spending approximately \$50,000 while in this manic stage. In November 1996, Pearson's family continued to express concern about his safety, and Dr. Harrison opined that Pearson was a danger to himself or others. Dr. Silverglat found Pearson's problems growing more complex as his mania lessened, and posited that Pearson might be entering a post-manic depression.

¶ 138 It was during this post-manic mild depression stage that Dr. McElhinny conducted his IME of Pearson. Dr. McElhinny found residual weaknesses and diffuse

cognitive impairment, but he did not see evidence of a bipolar mood disorder nor was he aware that other medical providers had diagnosed Pearson with that condition. Dr. McElhinny opined that, at the time he saw Pearson in December 1996, Pearson was a competent person with the capacity to understand his actions and their consequences.

¶ 139 Within two months of his appointment with Dr. McElhinny, Pearson's doctors were reporting that he was sliding into a deepening depression. In March 1997, Dr. Silverglat noted that he saw no improvement in Pearson's thinking, behavior, or mood. Based on Maynard's representation that Pearson had ceased to cooperate with medical treatment, Dr. McElhinny found Pearson at maximum psychological improvement without examining him in April 1997.

¶ 140 After Dr. McElhinny's finding of maximum psychological improvement, Maynard and DiRe began negotiating a settlement of Pearson's claim. Greg testified that he did not believe Pearson could have rationally handled the settlement funds at that time, and believes Pearson likely continues to be unable to handle a large sum of money. Greg and Pearson both testified that Pearson would have settled his claim for any amount, and that he quickly spent the settlement funds. Pearson further testified that he did not have any awareness of the settlement negotiations and that he was "severely impaired" at that time due to his extreme manic and depressive moods.

¶ 141 After reviewing this case, Dr. Bach opined that Pearson was not capable of understanding the settlement agreement and that his cognitive deficits and bipolar mood disorder made it unlikely that he could fully understand the document. Slovak testified that Pearson was not psychologically or psychiatrically stable when he entered into the settlement agreement and that his medical providers should have been asked about Pearson's competence at that time. Slovak further opined that DiRe should have realized that Pearson was unlikely to manage his settlement funds prudently.

¶ 142 Conversely, MIGA argues that Pearson was competent when he entered into the settlement agreement with Valor. The sum total of MIGA's evidence, however, appears to be the opinion of Dr. McElhinny, who saw Pearson once in December 1996 and who was unaware that Pearson had been diagnosed with a bipolar mood disorder. On the weight of the evidence presented, I conclude that it is more probable than not that Pearson was not competent at the time he entered into the settlement agreement.

¶ 143 In *Parrent v. Midway Toyota*, the Montana Supreme Court held that a minor who had entered into an agreement settling his workers' compensation claim could rescind the agreement after he reached the age of majority. In *Parrent*, the claimant's mother was aware of the terms of the settlement agreement at the time her son signed the agreement; however, although she did not object to her son signing the settlement

agreement, she also did not cosign the agreement as his legal guardian.²²⁷ The court noted that a petition for final settlement is a contract, and therefore contract principles must be applied to determine the petition's validity and enforceability.²²⁸ As the court further noted, since the claimant signed the petition for final settlement on his own behalf, he alone was the contracting party.²²⁹

¶ 144 Likewise, in the present case, Pearson signed the petition for final settlement on his own behalf, rendering himself the contracting party. Under § 28-2-201, MCA, Pearson, like the claimant in *Parrent*, had limited capacity to contract on his own behalf. More specific to Pearson's case, under § 28-2-203, MCA, his contract is subject to rescission because he was "of unsound mind" at the time it was made.

¶ 145 MIGA argues, however, that regardless of Pearson's competency, his attempt at rescission is nonetheless untimely. Pearson filed his Petition for Trial on October 15, 2008 – more than eight years beyond the date he entered into the settlement agreement. MIGA argues that Pearson would have had to file his petition no later than June 12, 2005, under § 27-2-202, MCA. However, MIGA overlooks the extension of the statute of limitations provided for in § 27-2-401(1), MCA, which states in pertinent part:

If a person entitled to bring an action mentioned in part 2 . . . is, at the time the cause of action accrues, . . . seriously mentally ill, the time of the disability is not a part of the time limit for commencing the action. However, the time limit cannot be extended more than 5 years by the disability of serious mental illness.

¶ 146 Pearson filed his Petition for Trial a little over three years after the statute of limitations would have run under § 27-2-202, MCA. Therefore, he is within the five-year extension allowed under § 27-2-401(1), MCA, for a person suffering from serious mental illness. I therefore conclude that Pearson's claim is not barred by the statute of limitations.

///

²²⁷ *Parrent*, 192 Mont. 118, 626 P.2d 848 (1981).

²²⁸ *Parrent*, 192 Mont. at 120, 626 P.2d at 849 (citing *Kienas v. Peterson*, 191 Mont. 325, 328, 624 P.2d 1, 2 (1981)).

²²⁹ *Parrent*, 192 Mont. at 121, 626 P.2d at 850.

ISSUE TWO: Whether the settlement agreement between Petitioner and Valor Insurance Company, approved June 12, 1997, should be reopened or set aside on the grounds set forth in the Petition for Trial.

¶ 147 In his Petition for Trial, Pearson contends:

The settlement agreement between Petitioner and Insurer is void ab initio, invalid, or unenforceable, and should be set aside for one or more of the following reasons: unconscionability; material failure of consideration; mutual mistake of fact; violation of the *Coles* requirements; equitable estoppel; material misconduct of the insurer that was unknown to Petitioner; and incompetency of Petitioner to enter into the agreement.²³⁰

¶ 148 Since, as set forth above in Issue One, I have concluded that Pearson was not competent to enter into the settlement agreement, I further hold that the settlement must be set aside for that reason.

ISSUE THREE: Whether Petitioner is entitled to attorney fees, costs, and a penalty pursuant to §§ 39-71-611, -2907, MCA.

¶ 149 At the start of trial on November 8, 2010, MIGA raised for the first time the issue of whether it was statutorily barred from being assessed a penalty under the Montana Workers' Compensation Act (WCA). I agreed to hear testimony regarding the issue of whether Valor had unreasonably adjusted Pearson's claim, reserving the issue of whether MIGA could be held liable for a penalty and/or attorney fees. On March 11, 2011, I advised the parties that I had determined that Valor's adjustment of Pearson's claim was unreasonable and I ordered the parties to brief the issues of MIGA's liability for a penalty and attorney fees.

¶ 150 Based on my findings above, I have concluded that Valor acted unreasonably in adjusting Pearson's claim. I note, however, that I do not find MIGA to have unreasonably adjusted this claim after it became involved. Ultimately, for reasons set forth more fully below, I have concluded that MIGA is not subject to a penalty and attorney fees under the WCA.

¶ 151 MIGA argues that it cannot be held liable for a penalty and/or attorney fees because it is not an "insurer" within the meaning of the WCA and further argues that it is statutorily precluded from being assessed a penalty or attorney fees under § 33-10-110, MCA.²³¹ Pearson contends that, while MIGA is "technically" not an insurer, MIGA

²³⁰ Petition for Trial at 4, Docket Item No. 1.

²³¹ Respondent's Opening Brief Regarding Penalty/Fees, Docket Item No. 65.

nonetheless is statutorily obligated to act as if it were an insurer. Pearson argues that these obligations extend to attorney fees and a penalty pursuant to §§ 39-71-611, -2907, MCA.²³²

¶ 152 Under § 39-71-116(13), MCA, an “insurer” means an employer bound by compensation plan one, an insurance company transacting business under compensation plan two, or Montana State Fund under compensation plan three. MIGA argues – and Pearson admits – that it does not fall under any of these classifications. Rather, MIGA is a nonprofit unincorporated legal entity per § 33-10-103, MCA, whose duties are defined under § 33-10-105, MCA. In the present case, the parties focus on the particular duties delineated in § 33-10-105(1)(b), MCA, which states:

[MIGA] is considered the insurer to the extent of its obligation on the covered claims and to that extent has all rights, duties, and obligations of the insolvent insurer as if the insurer had not become insolvent.

¶ 153 Both parties set forth credible arguments as to whether this language makes MIGA liable for attorney fees and a penalty under the WCA for the actions taken by Valor prior to its insolvency. However, Pearson’s remedy does not lie within Title 33: it is within the WCA and as such, in order for MIGA to be assessed attorney fees and a penalty under the applicable WCA statutes, MIGA must be an insurer.

¶ 154 In *Pekus v. Uninsured Employers’ Fund*, this Court held that §§ 39-71-611, -2907, MCA, did not allow for an award of attorney fees or a penalty against the UEF because the UEF is not an “insurer” within the meaning of the WCA.²³³ This Court has previously noted that it cannot fashion a remedy without regard to the specific relief available within the WCA.²³⁴ The WCA provides for awards of attorney fees or penalties specifically in cases involving insurers. Since it is not an insurer, MIGA is not subject to the penalty and attorney fee statutes of the WCA.

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²³² Petitioner’s Reply Brief in Support of an Award of Attorney Fees and Penalty at 3, Docket Item No. 67.

²³³ *Pekus*, 2003 MTWCC 33, ¶ 4.

²³⁴ *Wright v. Ace American Ins. Co.*, 2010 MTWCC 11, ¶ 82.

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¶ 155 Petitioner's claims are not barred by the applicable statutes of limitations, found at §§ 27-2-202, -203, MCA.

¶ 156 The settlement agreement between Petitioner and Valor Insurance Company, approved June 12, 1997, should be reopened or set aside on the grounds set forth in the Petition for Trial.

¶ 157 Petitioner is not entitled to attorney fees, costs, or a penalty pursuant to §§ 39-71-611, -2907, MCA.

¶ 158 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 9th day of January, 2012.

(SEAL)

/s/ JAMES JEREMIAH SHEA
JUDGE

c: Norman L. Newhall
Geoffrey R. Keller
Submitted: April 8, 2011