IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

2014 MTWCC 16

WCC No. 2009-2326

JAMES RUSHFORD

Petitioner

vs.

MONTANA CONTRACTOR COMPENSATION FUND

Respondent/Insurer.

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND JUDGMENT

Summary: In October 2007, Petitioner became ill after inhaling paint and diesel exhaust fumes while working as a carpenter. Petitioner's condition did not improve and he was eventually diagnosed with RADS. Petitioner contends that he is permanently totally disabled and that he is entitled to retroactive TTD benefits. Petitioner further contends that Respondent should be liable for ongoing coverage for the medical treatment recommended by his treating physician, including a referral to a neurologist. Petitioner further contends that he is entitled to his attorney fees, costs, and a penalty. Respondent denies that it has any further liability in this matter. It contends that Petitioner does not have RADS, has suffered no ongoing effects from his industrial injury, and that Petitioner is not permanently totally disabled.

Held: The Court found Petitioner's subjective reports of his disability to be wholly lacking in credibility, and the Court further found that Petitioner misrepresented his condition to his medical providers. Based on the evidence presented, the Court concluded that Petitioner is not permanently totally disabled and is not entitled to retroactive TTD benefits. The Court further concluded that Petitioner is not entitled to receive ongoing treatment as recommended by his treating physician, as his current condition is not related to his industrial injury. The Court concluded that Respondent is not liable for the referral to a neurologist recommended by Petitioner's treating physician. The Court further concluded that Petitioner is not entitled to his attorney fees, costs, or a penalty.

Topics:

Surveillance. Historically, this Court has found surveillance to be of limited use in making credibility determinations. It is not always apparent if the activity actually exceeds the claimant's purported limitations, nor does it show the aftermath, when a claimant may suffer for exceeding his limitations. However, in this instance, the Court could not reconcile the wide disparity between what Petitioner reported to his doctors and testified to, and the activities which were captured on the surveillance videos, which demonstrated that Petitioner was dishonest in his testimony.

Medical Evidence: Functional Capacity Evaluations. Although the Court found the FCE evaluator credible, it gave little weight to her FCE results because she found the claimant's subjective complaints credible where the Court did not. Furthermore, she offered no explanation as to why Petitioner was able to overcome his alleged respiratory difficulties while engaged in recreational activities, but would be unable to do so in an employment context.

Physicians: Treating Physician: Weight of Opinions. While the Court found Petitioner's treating physician credible and qualified, the Court gave his testimony and opinions less weight. The treating physician's reliance on Petitioner's credibility was an inseparable component of his diagnosis and treatment, and while the treating physician found Petitioner credible, the Court did not.

Medical Condition (By Specific Condition): Reactive Airways Dysfunction Syndrome. Where the Court found Petitioner lacking in credibility, it rejected the treating physician's opinion that Petitioner suffered from RADS, a condition reliant on self-reporting and testing that is effort-dependent. The treating physician's reliance on Petitioner's credibility was an inseparable component of his diagnosis and treatment, and while the treating physician found Petitioner credible, the Court did not.

Constitutions, Statutes, Regulations, and Rules: Montana Code Annotated: 39-71-702. The Court rejected Petitioner's treating physician's opinion that Petitioner is not competitively employable where the treating physician based that opinion in part on the incredible reporting of his patient and in part on an FCE report which the Court found entitled to little weight.

Physicians: Treating Physician: Weight of Opinions. Where Petitioner allegedly suffered from a work-related respiratory condition, the Court reasoned that the IME physician and the treating physician had different, yet appropriate qualifications to evaluate the case. The IME doctor's expertise lies in the area of occupational exposure, while the treating physician's expertise is respiratory conditions. The Court further found that the IME physician had a higher quality of evidence upon which to base his opinions: he reviewed an extensive collection of Petitioner's pre-exposure medical records and also reviewed video surveillance of Petitioner.

Benefits: Permanent Total Disability Benefits: Generally. The Court concluded that Petitioner did not meet his burden of proving that he was permanently totally disabled. Although an FCE evaluator and Petitioner's treating physician both opined that Petitioner was not employable, the Court found Petitioner incredible and found that the opinions of the FCE evaluator and treating physician inextricably relied on their finding Petitioner credible.

Constitutions, Statutes, Regulations, and Rules: Montana Code Annotated: 39-71-701. The Court found that Petitioner's time-of-injury employer would have been able to accommodate the restrictions Petitioner had at the time he was released to work. The Court rejected Petitioner's unsupported argument that he should be entitled to TTD benefits because he moved out of state and was therefore unable to accept the modified job position.

Benefits: Temporary Total Disability Benefits. The Court found that Petitioner's time-of-injury employer would have been able to accommodate the restrictions Petitioner had at the time he was released to work. The Court rejected Petitioner's unsupported argument that he should be entitled to TTD benefits because he moved out of state and was therefore unable to accept the modified job position.

Benefits: Medical Benefits: Liability. Where the Court found Petitioner wholly lacking in credibility, it concluded that Petitioner had not met his burden of proving that any of his respiratory problems are related to his industrial injury. Therefore, Respondent is not liable for further medical treatment.

¶ 1 The trial in this matter began on April 22, 2014, at the Workers' Compensation Court. It continued on April 23, 2014, at Lesofski Court Reporting, 7 West Sixth Avenue, in Helena. After a recess, trial continued later that day at the Workers' Compensation Court. Trial concluded on April 24, 2014, at the Workers' Compensation Court. After closing arguments, I ruled that counsel could file additional documentation to identify specific sections of the video surveillance submitted into evidence by the close of business on April 30, 2014. I deemed this matter submitted for decision at the close of business on April 30, 2014.

¶ 2 On April 22, 2014, Petitioner James Rushford appeared and was represented by Richard J. Pyfer. Larry W. Jones represented Respondent Montana Contractor Compensation Fund (MCCF). Mel Pozder, claims examiner for MCCF, also attended. On April 23, 2014, Pyfer represented Rushford and Jones represented MCCF. Pozder also attended. On April 24, 2014, Pyfer represented Rushford, and Rushford attended part of the proceedings on that day. Jones represented MCCF. Pozder also attended.

¶ 3 Exhibits: I admitted Exhibits 3, 4, 7, 9, 20, 24, 31 through 36, 46 through 48, 53, and 54 without objection. I admitted Exhibits 1, 2, 10 through 19, 21, 26 through 29, 37 through 45, 49, and 50 over the parties' respective relevancy objections. MCCF withdrew Exhibits 5, 6, 8, 23, and 30. I overruled Rushford's objections to Exhibits 22 and 25 and admitted them into evidence.

¶ 4 Witnesses and Depositions: I admitted the depositions of Rushford, Patrick G. Arndt, M.D., Karen Hardine, OTR/L, and Sharon Rushford into evidence. On April 22, 2014, Phillip Bushilla, William Mayer, Sharon Rushford (Sharon), Pozder, and Rushford were sworn and testified at trial. On April 23, 2014, Dr. Arndt and Hardine were sworn and testified by videoconference from Minnesota. Peter Elliot and David J. Hewitt, M.D., M.P.H., were also sworn and testified. On April 24, 2014, Pozder and Rushford continued their respective testimony. Richard L. Smith, PT, OCS, and Tony Stonehouse were also sworn and testified.

¶ 5 Issues Presented: The parties have presented issues for resolution[1] which I have restated as follows:

> Issue One: Whether Petitioner is permanently totally disabled;
>
> Issue Two: Whether Respondent is liable to Petitioner for retroactive temporary total disability benefits;

[1] *See* Pretrial Order, Docket Item No. 127, at 8.

Issue Three: Whether Respondent is liable for Petitioner's referral to a neurologist as recommended by his treating physician, Dr. Arndt;

Issue Four: Whether Respondent is liable for Petitioner's ongoing medical treatment as recommended by his treating physician, Dr. Arndt;

Issue Five: Whether Petitioner is entitled to attorney fees and costs;

Issue Six: Whether Petitioner is entitled to a penalty; and

Issue Seven: Whether Respondent is liable to Petitioner for any unpaid medical bills.

FINDINGS OF FACT

¶ 6 On October 2, 2007, Rushford was in the course and scope of his employment with Dick Anderson Construction in Helena when he was exposed to fumes in the workplace. MCCF accepted liability for part of Rushford's claim.[2]

Testimony of Jobsite Witnesses

¶ 7 Phillip Bushilla testified at trial. I found him to be a credible witness. Bushilla resides in Helena, and owns a business called Integrity Electric. Bushilla testified that in October 2007, his company subcontracted on the Bed Bath & Beyond building in Helena. Bushilla testified that William Mayer, his foreman for that job, expressed concern to him about paint spraying which was occurring inside the building while the electrical crew was working. Bushilla testified that a partition was then installed inside the building so that the painters could work in one part of the building while his crew worked in the other.[3]

¶ 8 Mayer testified at trial. I found him to be a credible witness. Mayer worked for Integrity Electric in October 2007 as the electrical foreman on a project at the Bed Bath & Beyond store in Helena.[4]

¶ 9 Mayer testified that some of his crew complained about the conditions in the building. Mayer testified that he was working in Integrity Electric's on-site job trailer, but he went into the Bed Bath & Beyond building to investigate the conditions and he believed that the fumes could make someone nauseous. Mayer brought his crew's

[2] Pretrial Order at 1.

[3] Trial Test.

[4] Trial Test.

concerns to the general foreman, who quickly solved the problem by "tenting" the paint crew. Mayer explained that Visqueen was placed from floor to ceiling to "tent off" the paint crew from the other workers. Mayer testified that at most, they worked alongside the painting crew for two days before the "tenting."[5]

¶ 10 Peter Elliot testified at trial. I found him to be a credible witness. Elliot has worked for Dick Anderson Construction for 16 years.[6] Elliot was the project superintendent on the Bed Bath & Beyond construction project. He testified that the building was approximately 18,000 or 20,000 square feet. Elliot believes that in October 2007, they ran two space heaters in the building which were approximately 300,000 BTUs each. Elliot testified that one heater was located at the south doorway facing inward while the other was facing in from the north. Openings in the building allowed for ventilation.[7]

¶ 11 Elliot testified that a painting crew painted the ceiling of the building using a type of paint called "dry fall." Elliot testified that "dry fall" paint dust is not hazardous or toxic, but it is a nuisance. The overspray from "dry fall" dries in midair and falls to the floor. Significant amount of dust from "dry fall" paint coats every surface below.[8]

¶ 12 Elliot testified that during the project, electricians working in the building complained to him about paint fumes. A Visqueen barrier was then installed which divided the building in a north-south direction. Elliot testified that the plan was for the painters to work on one side of the Visqueen partition while the other workers worked on the other side.[9] However, Elliot testified that some workers did work on the same side of the partition as the painters. Elliot's workers then installed another partition which bisected the building from east to west to better allow the work crews to continue working while remaining outside of the active paint areas.[10]

¶ 13 Elliot testified that Rushford also complained to him about fumes and that both the painters and Rushford complained about a diesel smell. Elliot could not recall whether the Visqueen was installed before or after Rushford complained.[11]

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[5] Trial Test.

[6] Trial Test.

[7] Trial Test.

[8] Trial Test.

[9] Trial Test.

[10] Trial Test.

[11] Trial Test.

¶ 14 Elliot's Daily Report notes from October 1, 2007, state in part, "issues on paint hazards – got MSDS from SW (paint supplier)."[12] On October 2, 2007, he noted, "painters – spray east ½ lid & ductwork dry fall 'dust all over' . . . James R. complained of headache while working on columns around paint dust. He should be workin[g] other side, asked to not work in there. OK'd it."[13] On October 3, 2007, he noted, "move Visqueen enclosures" and that the painters were now on the west side. He further stated:

> Paint overspray exposure.
>
> Urgent Care – met James R. @ Urgent Care – in to see about headaches & painful pissing as it may relate to water borne acrylic paint exposure. Dr. Pudjol [sic] gave a return to work OK but gave Rx drugs for dust exposure, not to work in dusty environment > went to Joe's job after lunch.[14]

From Elliot's contemporaneous notes, it appears that at least one of the Visqueen barriers was in place at the time of Rushford's exposure.

¶ 15 Tony Stonehouse testified at trial. I found him to be a credible witness. Stonehouse has been the resource manager at Dick Anderson Construction for the past 12 years. His job duties include human resources, equipment purchasing and logistics, and return-to-work.[15] Stonehouse hired Rushford to work for Dick Anderson Construction.[16]

¶ 16 Stonehouse testified that when workers suffer on-the-job injuries, he and Tom Tubbs, the safety director, receive work restrictions from the injured worker's doctor. Stonehouse and Tubbs attempt to provide the employee work within the doctor's restrictions. Stonehouse testified that Dick Anderson Construction's policy is to get injured workers back to work as quickly as possible.[17]

¶ 17 Stonehouse testified that he has accommodated everyone who wanted to return to work as part of their light-duty program. Stonehouse testified that if someone cannot work a full 40-hour week, but can return to work for 10 or 20 hours per week, he can

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[12] Ex. 2 at 1.

[13] Ex. 2 at 8.

[14] Ex. 2 at 9.

[15] Trial Test.

[16] Trial Test.

[17] Trial Test.

accommodate that restriction. Stonehouse testified that in the return-to-work program, an injured employee may be placed back on the jobsite or may be given office work.[18]

¶ 18 Stonehouse testified that at the time that he offered Rushford the opportunity to return to work within his restrictions, he was not aware that Rushford had moved to Bismarck, North Dakota. Stonehouse testified that if Rushford had returned to work under the return-to-work program, he would have received his normal rate of pay and benefit package. Stonehouse testified that he would have accommodated Rushford's restrictions, and he had the flexibility to move Rushford to a different jobsite or to assign him work in the office.[19]

December 4, 2012, Deposition Testimony of Petitioner James Rushford

¶ 19 Rushford testified that he was off work from 1995 until 2006.[20] In 1995, he had filed a workers' compensation claim for an industrial accident.[21] He testified that afterwards, he was unable to work due to severe neck pain.[22] Rushford testified that prior to 2006, he believed he had a tumor in his neck and that he was going to become quadriplegic. However, in 2006, he learned that he did not have a tumor. He then went back to work because he got used to the pain.[23]

¶ 20 Rushford testified that in 2006, he and his family moved to Helena. He spent their first year here building their residence. In 2007, he sought a construction job with Dick Anderson Construction.[24] Dick Anderson Construction hired him as a carpenter, and Rushford spent a few months working on a remodeling job at the Holiday Inn in Helena.[25] He then went to work on a job at the Bed Bath & Beyond store and worked at that location for approximately a month when his industrial accident occurred.[26]

¶ 21 Rushford testified that on October 2 and 3, 2007, he was installing steel studs around a column. On October 2, he spent most of the day installing studs near the ceiling while a co-worker secured the bottom of the studs near the floor. Electricians

[18] Trial Test.

[19] Trial Test.

[20] Rushford 12/4/12 Dep. 40:10-12.

[21] Rushford 12/4/12 Dep. 40:16-24.

[22] Rushford 12/4/12 Dep. 41:8-15.

[23] Rushford 12/4/12 Dep. 43:7 – 44:21.

[24] Rushford 12/4/12 Dep. 46:4-14.

[25] Rushford 12/4/12 Dep. 47:14-23.

[26] Rushford 12/4/12 Dep. 48:21 – 49:3; Trial Test.

were also working in the building, and the paint crew arrived and began painting that day.[27]

¶ 22 Rushford testified that diesel fuel heaters were operating in the building to cause the paint to dry faster. The heaters' locations allowed paint overspray to be sucked into them and vaporized. Rushford testified that he was not wearing a face mask, and the doors to the building were closed. Rushford complained to Elliot, the general supervisor, that he was getting a headache and dizziness from the fumes.[28]

¶ 23 Rushford testified that he felt worse as the day went on.[29] He experienced nausea, dizziness, coughing, and a headache.[30] Rushford testified that from when he went home from work that day until he returned the following morning, he felt light-headed and was "coughing up black." He did not immediately seek medical attention because he believed his condition would resolve itself.[31]

¶ 24 Rushford explained:

> I don't remember if we started at six or seven. We were working ten-hour days. I was putting - - me and the gentleman I was working with were putting steel studs around the columns that hold up the building to hide those columns, and, at the same time, they had the painting contractor in there painting, and they had brought in four diesel heaters to heat the building while they were painting. And so, [we] worked the first ten hours, we were complaining because they wouldn't open up doors to allow fresh air in. And, so, we worked through that day. The next day, [we] came in in the morning, we started working again and was complaining about - - because I was working up in the ceiling area, and worked four hours, and I told [Elliot] if he wouldn't open up the doors, I quit. And [Elliot] said I guess you're gone.[32]

¶ 25 Rushford testified that when he left the jobsite on October 3, he had a headache, nausea, dizziness, and a cough.[33] He was also coughing up black mucus.[34] Later that

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[27] Trial Test.

[28] Trial Test.

[29] Rushford 12/4/12 Dep. 54:23-25.

[30] Rushford 12/4/12 Dep. 55:2-3.

[31] Rushford 12/4/12 Dep. 62:4 – 63:12.

[32] Rushford 12/4/12 Dep. 50:20 – 51:11.

[33] Rushford 12/4/12 Dep. 67:20-24.

[34] Rushford 12/4/12 Dep. 67:25 – 68:5.

afternoon, he began coughing up blood.[35] Rushford testified that he does not recall when he sought medical attention, but he does not believe that it was the same day.[36]

¶ 26 Rushford testified that the following week, he worked for Dick Anderson Construction on a different jobsite.[37] He testified that prior to working on that jobsite, he went to a medical appointment with the "superintendent" from the Bed Bath & Beyond jobsite.[38] Rushford testified that at that point, his symptoms had not improved and he continued to cough up blood intermittently.[39] He testified that he believes he worked on this subsequent jobsite for a week or more.[40] However, he left the job because he developed pneumonia.[41] After that, he never returned to work for Dick Anderson Construction.[42]

¶ 27 After his industrial accident, Rushford resided in Helena for another year or year and a half. He and his family then moved to Bismarck.[43] In Bismarck, he treated with a pulmonologist, but his symptoms did not improve.[44] Rushford and his family now reside in Alexandria, Minnesota.[45]

¶ 28 Rushford testified that after the industrial exposure, he developed pneumonia. After it resolved, he was left with severe chest pain, headaches, difficulty breathing, and insomnia.[46] Rushford testified that every year since, he suffers one or two bouts of pneumonia. He stated that each bout lasts longer than the one before, and the most recent bout of pneumonia before his December 4, 2012, deposition lasted for two months.[47]

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[35] Rushford 12/4/12 Dep. 68:8-12.

[36] Rushford 12/4/12 68:25 – 69:5.

[37] Rushford 12/4/12 Dep. 72:22 – 73:7.

[38] Rushford 12/4/12 Dep. 73:14-22.

[39] Rushford 12/4/12 Dep. 74:6-17.

[40] Rushford 12/4/12 Dep. 76:22-25.

[41] Rushford 12/4/12 Dep. 77:2-6.

[42] Rushford 12/4/12 Dep. 77:17-19.

[43] Rushford 12/4/12 Dep. 80:22 – 81:3.

[44] Rushford 12/4/12 Dep. 81:7-20.

[45] Rushford 12/4/12 Dep. 7:20-22.

[46] Rushford 12/4/12 Dep. 78:12-15.

[47] Rushford 12/4/12 Dep. 87:16-24.

¶ 29 Rushford testified that he has had dizziness since the day of his industrial exposure.[48] He explained, "I live in la la land. It's like everything's spinning constantly. I've gotten used to it somewhat, but it can get worse."[49] Rushford testified that he is supposed to be seeing a neurologist because "I live in la la land."[50]

¶ 30 Rushford testified that he now cannot tolerate being around certain fumes. His throat starts to close and his lungs fill with fluid. He coughs and suffers from exhaustion.[51]

¶ 31 Rushford testified that at home he helps with household chores, although a doctor cautioned him against vacuuming because of the dust.[52] Rushford testified that he cannot help with laundry because Sharon uses bleach and it bothers him.[53]

¶ 32 Rushford testified that he cannot mow his lawn because of dust and he cannot shovel snow because the cold bothers his lungs.[54] He testified that Sharon does the gardening, and his only participation is to turn on the sprinklers.[55] Rushford testified that he is bothered by oil and gas smells when he drives in urban areas, and the only time he fills his own gas tank is on windy days.[56]

¶ 33 Rushford testified that he is unable to walk the distance of a city block without having physical problems.[57] He testified that he gets dizzy if he walks around his yard.[58] He testified that when he has attempted to participate in physical exercise, he becomes dizzy and short of breath and his throat begins to close.[59]

¶ 34 Rushford testified that since his industrial accident, he has been unable to work on any remodeling or home improvement projects for himself or for anyone else.[60]

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[48] Rushford 12/4/12 Dep. 75:12-14.

[49] Rushford 12/4/12 Dep. 75:15-21.

[50] Rushford 12/4/12 Dep. 29:17-25.

[51] Rushford 12/4/12 Dep. 79:12-22.

[52] Rushford 12/4/12 Dep. 113:2-5, 113:24 – 114:2.

[53] Rushford 12/4/12 Dep. 115:4-13.

[54] Rushford 12/4/12 Dep. 116:13-25.

[55] Rushford 21/4/12 Dep. 117:10-13.

[56] Rushford 12/4/12 Dep. 119:4-9.

[57] Rushford 12/4/12 Dep. 129:12-18.

[58] Rushford 12/4/12 Dep. 129:19-22.

[59] Rushford 12/4/12 Dep. 129:23 – 130:9.

[60] Rushford 12/4/12 Dep. 125:18-25.

Rushford testified that he wishes a job existed that he would be capable of performing, but he does not believe one exists. He stated that he does not believe he could safely perform a job because he has difficulty focusing and is forgetful.[61]

¶ 35 Rushford testified that since his industrial accident, he becomes exhausted very quickly and he believes that some days it is not safe for him to drive.[62] Rushford testified that prior to his industrial accident, he frequently enjoyed hunting and fishing.[63] He also used to enjoy boating. However, since the industrial accident, he has lost interest in pursuing these hobbies.[64]

¶ 36 Rushford testified that he does not do any activities for fun and he does not belong to any clubs, leagues, or civic organizations.[65] Rushford further testified that he has one friend that he socializes with in Alexandria who calls him every few days on the telephone, but that is the extent of his socializing. He admitted that "[o]nce in a great while maybe" he goes out for a beer. Rushford testified that he might drink one beer each week, but sometimes will not drink any alcohol for a month at a time.[66]

¶ 37 Rushford testified that on a typical day, he wakes up between four and six a.m. He stated that he typically has four to six bowel movements per day and it usually takes him until 11 a.m. or noon before they are completed. Then, "the rest of the day is pretty much sitting around."[67] Rushford testified that he rarely leaves the house for more than 15 or 20 minutes at a time.[68] He testified that he and Sharon rarely go out together.[69]

¶ 38 Rushford testified that he was smoking at the time of his industrial accident, and he continued to smoke for some time afterward, but he does not recall how long.[70] He testified that at the time of his industrial accident, he had been smoking for four or five years.[71] Rushford testified that he has "smoked on and off. I never really smoked

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[61] Rushford 12/4/12 Dep. 96:13-23.

[62] Rushford 12/4/12 Dep. 104:2-20.

[63] Rushford 12/4/12 Dep. 105:16-25.

[64] Rushford 12/4/12 Dep. 106:11-24.

[65] Rushford 12/4/12 Dep. 108:15-25.

[66] Rushford 12/4/12 Dep. 109:6-25.

[67] Rushford 12/4/12 Dep. 120:2-12.

[68] Rushford 12/4/12 Dep. 122:21-25.

[69] Rushford 12/4/12 Dep. 123:15-16.

[70] Rushford 12/4/12 Dep. 83:18-25.

[71] Rushford 12/4/12 Dep. 84:2-5.

much."[72] He testified that he was approximately 19 or 20 years old when he began smoking.[73] Rushford testified that when he smoked, he smoked between 8 and 12 cigarettes per day.[74] Rushford testified that he "quit for years and then started back up again," but during time periods when he smoked, he generally averaged 10 cigarettes per day.[75]

¶ 39 Rushford testified that after the industrial accident, he believes he quit smoking while he still resided in Helena. He does not recall smoking in Bismarck.[76] Rushford testified that when he stopped smoking while he lived in Helena, his symptoms did not improve and he does not believe the smoking had an impact on his lungs. He testified that he quit smoking because, "[I] [j]ust figured it can't do any good."[77] Rushford further testified that he has not smoked at all since moving to Alexandria.[78] Rushford testified that Sharon smokes, but does not do so inside their home and he is rarely near her when she smokes.[79]

Video Surveillance

¶ 40 MCCF conducted surveillance of Rushford in Alexandria, and also on at least one occasion when Rushford traveled to Helena to participate in a settlement conference in this case. Some of the surveillance was recorded on video, and MCCF submitted DVDs as part of the record in this matter. The video surveillance footage is dated April 23, May 7, May 8, May 21, and June 4, 2012,[80] and April 29, May 6, May 13, May 18, May 19, May 20, May 21, and May 22, 2013.[81]

¶ 41 Historically, I have found surveillance footage to be of limited use in making credibility determinations. It is not always readily apparent if the activity in which a claimant is engaged actually exceeds the claimant's purported limitations. Surveillance footage also does not allow us to view the aftermath, when a claimant may pay dearly for choosing to exceed his or her realistic limitations for a moment. However, in the present case, I simply cannot reconcile the wide disparity between what Rushford

[72] Rushford 12/4/12 Dep. 81:25 – 82:6.

[73] Rushford 12/4/12 Dep. 82:12-15.

[74] Rushford 12/4/12 Dep. 82:20-25.

[75] Rushford 12/4/12 Dep. 83:2-5.

[76] Rushford 12/4/12 Dep. 86:16-22.

[77] Rushford 12/4/12 Dep. 90:11-22.

[78] Rushford 12/4/12 Dep. 86:23 – 87:3.

[79] Rushford 12/4/12 Dep. 130:10-20.

[80] Ex. 16.

[81] Ex. 21.

reported to his doctors and testified to in his deposition and at trial, and the activities which were captured on the surveillance videos.

¶ 42 The surveillance captured Rushford smoking numerous cigarettes at frequent intervals. It captured him engaged in a variety of activities which appear to exceed the limitations he reported to his medical providers, and to which he testified at his December 4, 2012, deposition.

¶ 43 At Rushford's December 4, 2012, deposition, he testified that he was unable to participate in dusty activities such as mowing his lawn. He testified that his only participation in gardening was to turn on sprinklers for his wife's garden. He testified that he is unable to walk a block without getting dizzy, and that he gets dizzy merely walking around his yard. He also testified that attempts to engage in physical activity leave him coughing and short of breath.

¶ 44 Rushford also testified that his only social outlets were occasional telephone conversations with a friend and on rare occasions, a beer. He specifically denied any involvement in clubs, leagues, or civic organizations.

¶ 45 The video surveillance footage belies Rushford's testimony. The 2012 footage, taken prior to his deposition, shows him smoking cigarettes on numerous occasions. It also shows him engaged in activities at the Eagles Aerie 3603 (Eagles Club) in Alexandria on multiple occasions. However, in addition to the video surveillance footage which shows Rushford playing horseshoes and engaging in other activities at the Eagles Club in 2012 and 2013, horseshoe league results from the *Alexandria Echo Press* list "Jim Rushford" in the Eagles Club horseshoe league results beginning on June 7, 2010, and continuing through the rest of the summer.[82] An October 27, 2010, article entitled "Eagles Horseshoe League awards pitchers" indicates that Rushford won "top honors" for Class B.[83] Rushford was listed in the 2011 weekly results from May 25, 2011, through September 28, 2011.[84] Rushford was also listed in the 2012 weekly results from May 14, 2012, through August 24, 2012,[85] and the 2013 weekly results as well.[86]

¶ 46 The video surveillance includes footage of Rushford when he traveled to Helena in connection with litigation. Some of the footage captured in Alexandria shows

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[82] Ex. 13 at 1-22.

[83] Ex. 13 at 23.

[84] Ex. 13 at 24-50.

[85] Ex. 13 at 51-64.

[86] Ex. 13 at 66-74.

Rushford engaged in running errands and shopping. The majority of the Alexandria footage depicts Rushford engaged in various activities at the Eagles Club. It is this footage which I found most troubling as it appears at odds with Rushford's testimony regarding his limitations and also appears to contradict his representations to his medical providers about his abilities.

¶ 47 The video surveillance footage of Rushford which was captured at the Eagles Club – primarily in the outdoor area in which the horseshoe pits are located – shows Rushford engaging in various activities which call into question his reports of an incapacitating respiratory condition. These activities include: raking a lawn; removing large wooden panels from the Eagles Club horseshoe pits; briskly carrying a 5-gallon bucket of water over a considerable distance after several hours of horseshoes and then parceling out its contents while others work the water into the surface of a horseshoe pit; digging the clay out of a horseshoe pit at the end of an evening of league play; single-handedly dragging picnic tables across a lawn; pounding on the ground with a tamping tool to flatten the surface of a horseshoe pit; carrying a large trash bag full of lawn debris and lifting it and several others over a closed tailgate into the back of a pick-up truck; bending from the waist to pick up sticks and small branches off the ground and breaking them in half with his hands; repeatedly pulling a starter cord to start a small engine; and pushing several wheelbarrow loads of a wet clay mixture. In watching the surveillance footage, I noted several instances in which Rushford appeared to be stiff or uncomfortable, and it was common for him to take advantage of nearby fences or other structures to lean against. However, what was notably absent from the surveillance footage were instances of coughing or instances in which Rushford appeared short of breath or struggled to engage in recreational activities. The absence of such limitations is notable because it is Rushford's respiratory complaints which are the focus of his current workers' compensation claim. Moreover, these activities were not brief and isolated events; rather they were sustained for hours at a time and occurred in some instances on consecutive days.

¶ 48 In particular, the surveillance video footage dated May 6, 2013, captures Rushford engaged in a series of activities which wholly contradict his representations as to his respiratory limitations. The footage shows Rushford arriving at the Eagles Club at a few minutes before 4 p.m. towing a flatbed trailer with a riding lawnmower on it. Rushford removed the strapping securing the lawnmower to the trailer, installed ramps on the back of the trailer, and drove the lawnmower off of the trailer without assistance and without any visible coughing or respiratory distress. He then removed the bagger from the mower. Rushford reached into the back of his SUV and retrieved a small dethatcher, which he carried to the mower and attached it. He then drove onto the Eagles Club lawn near the horseshoe pits and engaged the dethatcher. Rushford then dethatched the lawn. At one point, he disembarked from the mower and, bending at the

waist several times in quick succession, picked up some debris from the ground which he discarded in a trashcan. Rushford then resumed dethatching.

¶ 49 After approximately 15 minutes, Rushford removed the dethatcher and then reinstalled the bagging system on the lawnmower. Rushford then began mowing the lawn in the area around the horseshoe pits. When Rushford engaged the mowing blades, he created a large, visible cloud of dust behind the mower. As he continued mowing, he passed back and forth through the dust cloud. In cutting the grass in the area between the horseshoe pits, Rushford frequently reversed the mower, placing himself inside the dust cloud.

¶ 50 After approximately 25 minutes of mowing, Rushford dismounted from the mower in order to drag a picnic table out of the way. The picnic table appeared to be an average-sized picnic table of metal and wood construction with the benches and tabletop affixed together as one unit. Rushford moved the table a distance of approximately eight feet by lifting two of its legs off the ground and dragging it. He then lifted the table onto a single leg and pivoted it before placing it on the ground. Rushford then returned to the mower. He did not appear to have any physical difficulty moving this table, nor did he appear to cough or to experience shortness of breath from the exertion.

¶ 51 Approximately one minute later, Rushford again dismounted from the lawnmower and moved four wooden picnic tables in rapid succession. These picnic tables were slightly larger than the first and appeared to be of solid wood construction. They were also the type in which the tabletop and seating surface are constructed as a single unit. Rushford again moved the tables by lifting one end so that two legs were off the ground and then dragged the remaining two legs. He moved each of these tables approximately six feet. Rushford then returned to the mower and mowed the area where the tables had been located. Again, Rushford did not visibly cough or exhibit any signs of shortness of breath during or after this activity. Rushford continued to mow under dusty conditions for three or four minutes before parking the mower on the flatbed trailer. As Rushford secured the mower on the trailer, a visible layer of dirt was apparent on the back of his shirt all the way up onto the shoulders, and the top surface of the mower's hood was visibly dusty. After ensuring that the mower was secured and closing the back doors of his vehicle, Rushford got into the driver's seat of his SUV and pulled away at approximately 4:49 p.m.

¶ 52 At 6:06 p.m., Rushford, wearing a clean shirt, returned to the Eagles Club. He then attended a social gathering or meeting which lasted approximately 40 minutes. Following the meeting, he socialized and played horseshoes until approximately 9:30 p.m., and then remained inside the Eagles Club until approximately 10:00 p.m.

¶ 53 Because of the sheer volume of the surveillance video, I *sua sponte* issued an order at the conclusion of trial in which I allowed the parties until Wednesday of the following week to submit a pleading directing the Court's attention to specific portions of the video which may support their respective positions. It bears noting that of the nineteen hours of surveillance video – much of which depicts Rushford engaged in physical activity – Rushford did not direct me to a single instance in which he coughs or appears short of breath.[87]

¶ 54 In light of this video footage and other discrepancies in Rushford's testimony I have found him to be wholly incredible. Even setting aside the issue of whether Rushford was experiencing respiratory symptoms which are not obvious on video, or whether the surveillance managed to catch him only on particularly good days, it is irrefutable that the surveillance proves that Rushford was dishonest about his smoking habits and about his activities when he sat for the December 4, 2012, deposition.

July 25, 2013, Deposition Testimony of Petitioner James Rushford

¶ 55 At his July 25, 2013, deposition, Rushford reviewed the description of his functional status and activity level contained in a functional capacity evaluation (FCE) prepared by Karen Hardine, OTR/L, and agreed that it accurately described his condition. He agreed that from the time of his previous deposition on December 4, 2012, through his FCE, this was an accurate description of "pretty much every day" for him.[88] Rushford stated that he gave his maximum effort at his FCE.[89] Rushford testified that on a daily basis, he lays down to rest, watches television, and lets his dogs out.[90] He testified that he does some cooking and housework as able, but it is usually limited to keeping the area in front of him on the coffee table clean and microwaving food.[91]

¶ 56 Rushford testified that on rare occasions, he mows his lawn if his son does not do it.[92] He testified that on one occasion, he raked an area in his garden.[93] He stated that since his previous deposition, he operated a riding lawnmower on one occasion.[94]

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[87] Notice of Filing Additional Documentation of Surveillance Footage, Docket Item No. 135.

[88] Rushford 7/25/13 Dep. 20:16 – 21:22.

[89] Rushford 7/25/13 Dep. 209:10-12.

[90] Rushford 7/25/13 Dep. 21:23 – 22:2.

[91] Rushford 7/25/13 Dep. 22:3-22.

[92] Rushford 7/25/13 Dep. 23:8-11.

[93] Rushford 7/25/13 Dep. 23:19-25.

[94] Rushford 7/25/13 Dep. 24:7-21.

He testified that he took a break approximately every 20 minutes when he operated the mower.[95]

¶ 57 He also testified that he moved a "little pile of dirt" at his home[96] and that it took him almost half a day to do so.[97] He estimated that the dirt was approximately a cubic yard in volume.[98] He testified that he could not move the dirt more quickly because of shortness of breath and back strain.[99] He testified that moving the dirt caused pain in his lower back radiating down his leg and worsening shoulder pain.[100] Rushford testified that aside from these instances, he could not recall performing any other yard work since his December 2012 deposition.[101]

¶ 58 Rushford testified that walking for too long or inhaling fumes worsens his shortness of breath. He testified that not all fumes bother him, but gas fumes and cleaning products do.[102] He testified that overexertion makes him cough.[103] Contrary to his testimony on December 4, 2012, Rushford stated that he does not believe dust causes him problems.[104]

¶ 59 Rushford testified that at his June 18, 2013, visit with Patrick G. Arndt, M.D., he volunteered that he had been playing horseshoes and that he was smoking again. Rushford admitted that he brought this up because he knew that he had been videotaped playing horseshoes and smoking.[105] Rushford testified that he had not previously deliberately concealed this information from Dr. Arndt; Dr. Arndt had not asked him about these activities.[106]

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[95] Rushford 7/25/13 Dep. 25:16-22.

[96] Rushford 7/25/13 Dep. 25:11-15.

[97] Rushford 7/25/13 Dep. 27:23 – 28:2.

[98] Rushford 7/25/13 Dep. 28:19-24.

[99] Rushford 7/25/13 Dep. 29:11-14.

[100] Rushford 7/25/13 Dep. 30:17 – 31:4.

[101] Rushford 7/25/13 Dep. 32:20 – 33:2.

[102] Rushford 7/25/13 Dep. 40:8-22.

[103] Rushford 7/25/13 Dep. 52:6-9.

[104] Rushford 7/25/13 Dep. 42:5-7.

[105] Rushford 7/25/13 Dep. 58:8 – 59:19.

[106] Rushford 7/25/13 Dep. 59:20-25.

¶ 60 Rushford testified that he is a member of the Eagles Club.[107] He testified that he has been a member of the club's horseshoe league since he moved to Alexandria.[108] Rushford plays in the Monday night league.[109]

¶ 61 Rushford testified that the surveillance video from May 6, 2013, depicts him with his riding lawnmower and trailer preparing to mow an area at the club. He testified that all the club members volunteer to help out.[110] He testified that from December 4, 2012, through May 6, 2013, he had brought his lawnmower to the club on his trailer and mowed approximately three or four times.[111] Rushford testified that he raked the horseshoe pits because the Eagles Club is a nonprofit entity and the members maintain it.[112]

¶ 62 Rushford testified that the wheelbarrow he used on May 18, 2013, at the club was his personal wheelbarrow which he transported there.[113] Rushford testified that when he used the wheelbarrow in that instance, he felt short of breath but did not allow himself to cough because the other people present were unaware of his condition.[114] Rushford testified that he has not informed his friends and acquaintances in Alexandria that he suffers from Reactive Airways Dysfunction Syndrome (RADS) or that he is disabled. He stated that he usually tells people that he is retired because of his shoulders.[115]

Trial Testimony of Petitioner James Rushford

¶ 63 Rushford testified that he never had any pulmonary or lung problems prior to October 2007.[116] Rushford also testified that he has never been a "big" smoker, and that he has stopped smoking at times because he just did not feel like smoking. He testified that he currently does not smoke very often, but he does find that it helps calm him down when he gets the "la la land" feeling.[117] Rushford testified that smoking does not

[107] Rushford 7/25/13 Dep. 103:18-20, 108:3-4.

[108] Rushford 7/25/13 Dep. 110:4-12.

[109] Rushford 7/25/13 Dep. 113:11-17.

[110] Rushford 7/25/13 Dep. 145:22 – 146:19.

[111] Rushford 7/25/13 Dep. 147:2-10.

[112] Rushford 7/25/13 Dep. 137:2-6.

[113] Rushford 7/25/13 Dep. 175:8-25.

[114] Rushford 7/25/13 Dep. 208:9-22.

[115] Rushford 7/25/13 Dep. 201:4-19.

[116] Trial Test.

[117] Trial Test.

make him cough and he has never had a smoker's cough.[118] Rushford testified that he does not smoke very often and sometimes goes a week or two between cigarettes. He stated he might smoke "a couple more" cigarettes when he drinks beer.[119] Rushford testified that he does not drink beer at home and only drinks it socially during the summer.[120]

¶ 64 Rushford testified that although cigarette smoke does not make him cough, he coughs from overexertion, such as going up a flight of stairs.[121] Rushford acknowledged that the video surveillance footage shows him walking up a flight of five stairs into the Eagles Club without pausing or exhibiting shortness of breath.[122] However, Rushford testified that the pitch of his stairs at home is steeper than the pitch of the stairs that lead onto the Eagles Club deck.[123]

¶ 65 Rushford testified that the only portions of the video surveillance footage he has seen are the portions shown to him by MCCF's counsel.[124] Rushford acknowledged that the video surveillance footage shows him squatting, and he testified that he does not know why Hardine's FCE report indicates that he is unable to squat.[125] Rushford stated that he does not remember his FCE, except that he can recall climbing stairs as part of a test.[126]

¶ 66 Rushford testified that horseshoe games on league night last between one and three hours.[127] Rushford testified that in a game of horseshoes, a player throws two horseshoes each turn for 25 turns, or a total of 50 throws. On league night, each team plays three games, so a league player throws 150 times during the course of the evening.[128] He further testified that a horseshoe weighs between two pounds and two pounds, four ounces.[129] Rushford also acknowledged that while playing horseshoes, he

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[118] Trial Test.

[119] Trial Test.

[120] Trial Test.

[121] Trial Test.

[122] Trial Test. In reaching these findings, the Court viewed instances of Rushford walking up this flight of stairs into the Eagles Club on numerous occasions and never saw Rushford pause or exhibit shortness of breath while doing so.

[123] Trial Test.

[124] Trial Test.

[125] Trial Test.

[126] Trial Test.

[127] Trial Test.

[128] Trial Test.

[129] Trial Test.

will bend at the waist to pick up his horseshoes dozens of times per game.[130] Rushford testified that he sometimes does not attend the horseshoe league night because he does not feel well or is exhausted.[131]

¶ 67 Rushford testified that after he filled the Eagles Club's horseshoe pits with clay, he spent two days at home lying on the couch because he was exhausted.[132] Rushford testified that he has good days and bad days and that on his good days, he feels like he can do some labor. However, he finds that he tires easily.[133] Rushford testified that he typically does better when he is outside in fresh air than when he is indoors.[134] Rushford testified that he currently spends his days trying to sleep.[135]

¶ 68 Rushford testified that while he was taking methotrexate, his dry cough improved, but it has worsened since he stopped taking the medication. It also helped him to sleep because it alleviated the coughing at night.[136] Rushford testified that he still has difficulty with coughing at night and in the morning he has problems with phlegm and coughing. He testified that he wakes Sharon up at night with his coughing.[137]

¶ 69 At trial, Rushford testified that he felt dizzy.[138] During his testimony on April 24, 2014, Rushford complained of breathing difficulties due to an odor he perceived in the courtroom. When I questioned him, he insisted that the odor had also been present on April 22, 2014, and that he had become ill from it then as well. Although Rushford asserted that he had had coughing and breathing difficulty in the courtroom on April 22, 2014, I observed neither, even though I made note of Rushford's condition throughout the time he was present in the courtroom.

Testimony of Sharon Rushford

¶ 70 Sharon Rushford testified at trial. Although I found her trial testimony to be credible in some respects, there were instances in which Sharon made observations regarding Rushford's respiratory condition which I simply cannot reconcile with my

[130] Trial Test.

[131] Trial Test.

[132] Trial Test.

[133] Trial Test.

[134] Trial Test.

[135] Trial Test.

[136] Trial Test.

[137] Trial Test.

[138] Trial Test.

personal observations of Rushford at trial and my observations of Rushford on the video surveillance footage.

¶ 71 Sharon is married to Rushford.[139] They have been married for 36 years.[140] They currently reside in Alexandria, Minnesota,[141] where Sharon works for the Social Security Administration.[142] Sharon has worked for the Social Security Administration for 35 years.[143]

¶ 72 Sharon testified that after they were married, Rushford worked a variety of jobs while also taking on side jobs in construction. In 1988, the family moved to St. Paul, Minnesota, and Rushford began working in construction full-time.[144]

¶ 73 In 1995, Rushford suffered a serious neck injury in a slip-and-fall accident at work.[145] Sharon explained that a tumor in Rushford's neck was surgically removed.[146] Sharon testified that after the surgery, Rushford ceased working in the construction field and no longer performed strenuous work.[147]

¶ 74 Sharon testified that Rushford did not perform any work at all until 1999 or 2000.[148] In approximately 2002 or 2003, he began performing remodeling work on the Rushford's personal residence.[149] Sharon testified that Rushford was able to undertake the remodeling work at his own pace and it took him approximately two years to complete the project.[150]

¶ 75 In July 2005, the Rushfords moved to Helena because of Sharon's job. Sharon testified that they purchased a small home which was only "a shell," and Rushford spent the first six to eight months finishing the inside, and also built a garage, laid sod in the yard, and installed a fence. Sharon testified that Rushford did the entire project himself,

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[139] Sharon Dep. 6:5-6.

[140] Trial Test.

[141] Sharon Dep. 6:20-22.

[142] Sharon Dep. 7:18-21.

[143] Sharon Dep. 7:22-24.

[144] Trial Test.

[145] Trial Test.

[146] Trial Test.

[147] Trial Test.

[148] Trial Test.

[149] Trial Test.

[150] Trial Test.

although she and their adult son also assisted him.[151] She stated that the project took between a year and a year and a half to complete.[152]

¶ 76 Sharon testified that after Rushford completed the work on their home in Helena, he decided to look for employment in the construction industry. He applied for a job with Dick Anderson Construction.[153] Sharon testified that prior to being hired by Dick Anderson Construction, the only paying jobs Rushford had held since 1995 were a few "side jobs."[154]

¶ 77 Sharon testified that after the October 2007 industrial injury, Rushford came home from work and was coughing and spitting up mucus, his complexion was gray and pale, and he was sweating. However, she testified that he did not seek treatment for his illness because they believed it would pass.[155]

¶ 78 Sharon testified that Rushford's respiratory condition never really improved after October 2007. She testified that he had a chronic cough and was prone to developing upper respiratory infections or pneumonia. He also could not sleep for more than three or four hours at a time. Sharon acknowledged that Rushford had sleep difficulties prior to October 2007, but she stated that he used to be able to sleep five or six hours at a time. Sharon testified that after the industrial injury, Rushford occasionally woke her up with coughing or his chest would make gurgling noises. He would then get out of bed and watch television in the living room.[156]

¶ 79 Sharon testified that the Rushfords left Montana in May or June of 2008.[157] The Rushfords moved from Helena to Bismarck, and then from Bismarck to Alexandria because of Sharon's job promotions.[158]

¶ 80 Sharon testified that after the family moved to Bismarck, Rushford did not do any work around the house. Sharon testified that in the year and a half the family lived in Bismarck, Rushford did not do any projects on the home and they bought a riding lawnmower because he did not have the energy to mow the lawn with a push mower.[159]

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[151] Trial Test.

[152] Trial Test.

[153] Trial Test.

[154] Trial Test.

[155] Trial Test.

[156] Trial Test.

[157] Sharon Dep. 19:1-2.

[158] Sharon Dep. 7:10-14.

[159] Trial Test.

Sharon testified that during the time they resided in Bismarck, Rushford would start coughing any time he exerted himself, and he typically had mucus build-up in the mornings.[160]

¶ 81 Sharon testified that Rushford continues to have mucus build-up overnight and typically in the mornings it takes him about two hours to clear his lungs.[161] Sharon testified that Rushford quit smoking sometime after October 2007, and did not smoke for six months to a year, but he resumed smoking after they moved to Alexandria.[162] Sharon testified that in the months preceding trial, Rushford typically smoked between three and five cigarettes per day.[163]

¶ 82 Sharon testified that she has witnessed Rushford having memory problems. She finds that if she does not leave him notes reminding him to do specific things during the day while she is at work, he does not remember to do them. On one occasion, he got lost while driving to a restaurant which they had patronized on several previous occasions, and Rushford has also gotten lost while driving to Dr. Arndt's office.[164] Sharon further testified that Rushford becomes ill from driving in larger cities because of the exhaust fumes, and on one occasion they had to leave a restaurant because he became ill from the smell of another diner's perfume. Sharon testified that she switched to organic cleaning products at home and no longer uses bleach because the smell irritated Rushford.[165]

¶ 83 Sharon testified that Rushford coughs and becomes short of breath when he attempts to perform normal tasks around the home such as carrying groceries in the house or sweeping light snow off the driveway.[166] She testified that he no longer attempts any sort of automotive maintenance because the smells bother him.[167] She testified that their home has a flight of six or seven stairs between the levels, and when Rushford ascends the stairs, he has to use the railing and he coughs.[168] Sharon testified that Rushford does not help with housework, but approximately two months

[160] Trial Test.

[161] Trial Test.

[162] Trial Test.

[163] Trial Test.

[164] Trial Test.

[165] Trial Test.

[166] Trial Test.

[167] Trial Test.

[168] Trial Test.

ago, he helped her push the couch approximately two feet so she could vacuum underneath it and he began to cough and became short of breath.[169]

¶ 84 Sharon testified that she is aware that private investigators took surveillance videos of her husband in 2012.[170] At the time of her deposition, she had not seen the videos.[171] Sharon testified that she had not seen the 2013 surveillance videos, either.[172]

¶ 85 Sharon testified that Rushford plays horseshoes in the Eagles Club league.[173] Sharon testified that she has been to the Eagles Club in Alexandria as Rushford's guest.[174] Sharon testified that Rushford has played horseshoes as far back as the 1990s.[175] Sharon further testified that Rushford has played horseshoes in the Eagles Club league since 2012 or 2013 and that he played in a horseshoe league prior to moving to Montana.[176] Sharon testified that in 2013, Rushford played horseshoes in the Eagles Club league for the entire season.[177] She believes he is on the 2014 league.[178]

¶ 86 Sharon further testified that Rushford does not drink beer at home, but he does drink socially when he goes out.[179] Sharon testified that Rushford smokes cigarettes, "[a] few a day, here or there."[180] She clarified that "a few" is two to three, maybe four, and that he does not smoke every day.[181] Sharon testified that she and Rushford have both smoked for approximately 35 years. Sharon testified that Rushford does not smoke very much, and he quit smoking four or five times over those 35 years, sometimes for over a year at a time.[182]

¶ 87 Sharon testified that from January 2013 through the first of July 2013, the most physically strenuous activity she saw Rushford perform was the project he did at the

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[169] Trial Test.

[170] Sharon Dep. 17:1-3.

[171] Sharon Dep. 17:6-7.

[172] Sharon Dep. 17:8-22.

[173] Sharon Dep. 9:14-16.

[174] Sharon Dep. 8:20 – 9:5.

[175] Sharon Dep. 10:10-14.

[176] Sharon Dep. 9:18 – 10:4.

[177] Sharon Dep. 10:16-18.

[178] Sharon Dep. 10:19-21.

[179] Sharon Dep. 10:24 – 11:5.

[180] Sharon Dep. 11:19-20.

[181] Sharon Dep. 11:21-24.

[182] Trial Test.

Eagles Club in the spring or summer of that year.[183] She testified that Rushford told her that he was helping fix the horseshoe pits.[184]

¶ 88 Sharon testified that before his injury, Rushford was very active. He took on side jobs, enjoyed hunting and fishing, and he helped people in the construction industry. He also did remodeling work on their homes.[185]

¶ 89 Sharon testified that in his current condition, Rushford tries to avoid physical activity.[186] He occasionally mows the lawn using their riding mower, but their son helps with that chore.[187] She further testified that he uses a rake for yard work "very little."[188] Sharon stated that he might move a little dirt when they prepare their garden for flowers and vegetables each year.[189]

¶ 90 Sharon testified that Rushford has not worked at any time for money or anything of value since the couple left Montana.[190] Sharon testified that Rushford usually does not tell people that he does not work, and that if they ask if he works, he tells them he is retired.[191]

Medical Chronology

¶ 91 On January 23, 1995, Rushford suffered a work-related neck injury while working in Minnesota. In March 2000, he settled that claim for $190,000.[192]

¶ 92 On April 9, 2007, Rushford complained of several months of nasal and sinus congestion with chest congestion for the past week. The examiner noted that Rushford was "not taking very deep breaths." He was diagnosed with sinusitis, but it was noted, "There is some concern for other etiology of his cough."[193]

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[183] Sharon Dep. 21:22 – 22:4.

[184] Sharon Dep. 22:8-11.

[185] Sharon Dep. 26:2-17.

[186] Sharon Dep. 26:19-22.

[187] Sharon Dep. 27:10-14.

[188] Sharon Dep. 27:20-22.

[189] Sharon Dep. 29:2-6.

[190] Sharon Dep. 24:13-16.

[191] Sharon Dep. 19:6-20.

[192] Ex. 1.

[193] Ex. 15 at 563-64.

¶ 93 On October 3, 2007, J.P. Pujol, M.D., saw Rushford for complaints of difficulty breathing. Dr. Pujol noted the following history:

> This 48-year-old gentleman works for Dick Anderson Construction. Apparently 2 days ago he was in a 10,000 square foot area where they were spraying paint, as well as 5 diesel heaters going on. He was wearing a paper face mask. He said his eye burned and he was developing a headache as well as a slight cough. He was able to continue to work for 9 hours that day. Yesterday he went back and tried to do it again but was unable to do so because of worsening of all the symptoms mentioned above. . . . He has had a history of reflux occasionally . . . . He says now it is a substernal burning sensation . . . .
>
> He does feel short of breath today, and today his cough is productive. He does smoke ¾ of a pack of cigarettes per day, but he says he has never had problems breathing in the past. He describes a frontal to occipital sharp stabbing headache today.[194]

¶ 94 Dr. Pujol conducted a physical exam. He noted, among other findings:

> CHEST clear to auscultation although he has poor inspiratory movement. I am not sure if this is due to poor effort or if he really cannot take deep breaths in, but it just seems like he would not take complete deep breaths. . . . PFTs showed mild restriction. Again, I am not sure if his effort was bad or not, but he did not seem to be able to take as deep a breath as I would have expected.[195]

Dr. Pujol diagnosed Rushford with a chemical exposure at work and prescribed Advair and prednisone and advised Rushford to stay out of environments where he could be exposed "to this type of chemical."[196]

¶ 95 On October 18, 2007, Carl P. Hallenborg, M.D., saw Rushford for breathing difficulties. After taking a history and examining Rushford, Dr. Hallenborg diagnosed him with toxic fume inhalation with severe bronchiolitis. On examination, Dr. Hallenborg found markedly diminished breath sounds without any adventitial breath sounds or vesicular breath sounds heard. Dr. Hallenborg recommended high dose steroids, a

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[194] Ex. 2 at 10.

[195] *Id*.

[196] *Id*.

Combivent inhaler, and follow-up with pulmonary function tests (PFT) and a chest x-ray.[197]

¶ 96 On November 5, 2007, a chest x-ray of Rushford revealed an elevated left hemidiaphragm.[198] Dr. Hallenborg took Rushford off work pending further testing.[199]

¶ 97 On November 6, 2007, Dr. Hallenborg saw Rushford and reported that although Rushford had been taking prednisone and Avelox for two weeks, he felt like he was getting worse. Rushford reported "coughing up thick goopy material" and feeling light-headed and unstable. Dr. Hallenborg found coarse breath sounds, left greater than right, but a little dullness to percussion. A CT scan revealed persistent elevation in the left hemidiaphragm with no obvious mass or lesions, but evidence of atelectasis. He diagnosed Rushford with mucus plugging due to toxic fume inhalation and ruled out occult infection and endobronchial lesion.[200]

¶ 98 On November 7, 2007, Rushford underwent a fiberoptic bronchoscopy with brushings and washings. The test revealed "[c]opious slimy, greenish, thick, mucoid mucous" and "[c]hanges of chronic bronchitis with dilated mucous glands . . . particularly in the left lung . . . ."[201]

¶ 99 On November 15, 2007, Dr. Hallenborg noted that Klebsiella was cultured from the tracheobronchial tree after the fiberoptic bronchoscopy. His impression was "[s]evere limitation of exercise despite normal oxygenation and clear chest raises the possibility of cardiovascular disease." He recommended an echocardiogram and advised Rushford to stay off work.[202] On that same date, a PFT indicated mild airways obstruction with air trapping, and mild restrictive lung disease with a loss in diffusion consistent with loss in alveolar volume consistent with clinical diagnosis of toxic fume inhalation but not excluding other pulmonary entities.[203]

¶ 100 On November 20, 2007, Hassan Massouh, M.D., performed chest x-rays on Rushford and compared the films to films taken on November 7, 2007. Dr. Massouh noted a slight elevation of the left hemidiaphragm and minimal atelectasis in the left

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[197] Ex. 3 at 1-2.

[198] Ex. 3 at 4.

[199] Ex. 3 at 10.

[200] Ex. 3 at 6.

[201] Ex. 3 at 11.

[202] Ex. 3 at 25.

[203] Ex. 3 at 26.

base, unchanged from the previous study, and the lungs otherwise clear with no pneumonia or congestive failure.[204]

¶ 101 On December 4, 2007, Dennis Palmer, M.D., performed x-rays on Rushford's chest. He found in comparing these films to films taken on November 20, 2007, a progression or development of left base atelectasis with elevation of the left hemidiaphragm, and stigmata of chronic obstructive pulmonary disease (COPD) with hyperinflationary pattern. Dr. Palmer noted no additional abnormalities aside from the development of the left basilar atelectasis since November 20.[205]

¶ 102 On December 11, 2007, PFT results showed mixed obstructive and restrictive lung disease with air trapping and loss in diffusion consistent with loss in lung volume.[206]

¶ 103 On January 10, 2008, John C. Schumpert, M.D., M.P.H., F.A.C.O.E.M., issued his Independent Medical Examination (IME) report. He noted that the purpose of the IME was to determine: Rushford's current diagnosis; whether that condition is causally related to his October 2007 industrial accident; if Rushford suffered a temporary or permanent aggravation of a preexisting condition, or if Rushford suffered a new injury; if Rushford requires any additional medical treatment or testing; if Rushford has reached maximum medical improvement (MMI); if Rushford has any temporary or permanent restrictions; and if Rushford suffered a permanent impairment and if so, the proper rating. Dr. Schumpert further noted that he was asked to provide recommendations for future medical treatment for the October 2007 industrial injury, if indicated.[207]

¶ 104 In conducting the IME, Dr. Schumpert reviewed medical records, took a history from Rushford, and physically examined Rushford.[208] According to Rushford's version of events, he inhaled exhaust from diesel heaters and fumes and dust caused by a paint crew while working on the construction of the Bed Bath & Beyond store in Helena. Rushford reported that five diesel heaters were running inside the space, and that the heaters were not vented. He further stated that no windows or doors were open and that the actions of the painting crew made conditions very dusty.[209] Rushford reported at the time of the IME that he continued to experience a productive cough and that he produced large amounts of white, green, brown, and sometimes blood-tinged sputum on a daily basis. Rushford further reported that he struggled with shortness of breath after

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[204] Ex. 15 at 618.

[205] Ex. 3 at 34.

[206] Ex. 3 at 36.

[207] Ex. 15 at 147.

[208] *Id*.

[209] *Id*.

walking 50 to 60 yards or going up stairs, and stated that he suffered from constant chest and back pain, and pain on his sides.[210]

¶ 105 Dr. Schumpert reviewed medical records beginning with Dr. Pujol's October 3, 2007, notes[211] and continuing through a PFT report from December 11, 2007.[212] On examination, Dr. Schumpert found very distant breath sounds in all lung fields without wheezes, rales, or rhonchi.[213] Dr. Schumpert further noted that Rushford underwent pre- and post-bronchodilator spirometry with a determination of diffusing capacity and a pulse oximetry monitored treadmill walking test as part of the IME. Rushford asked to terminate the treadmill test after three minutes because he reported feeling too dizzy to continue.[214] A CT scan obtained on January 14, 2008, revealed linear scarring in the left lung base and a small pleural nodule in the right lower lobe. Rushford's lungs were hyperinflated. Dr. Schumpert stated, "The CT scan was felt to represent 'mild intralobular septal thickening with changes of [COPD], but no bronchiectasis or mass is seen.'"[215]

¶ 106 In his assessment, Dr. Schumpert noted: left lower lobe Klebsiella pneumonia, work-related; acute exacerbation of chronic bronchitis, work-related; COPD, not work-related; history of bilateral carpal tunnel syndrome, not work-related; history of gastroesophageal reflux disorder, not work-related; history of hypertension, not work-related; history of cluster headaches, not work-related; history of bilateral shoulder arthroscopic subacromial decompression, not work-related; history of craniotomy, not work-related; and history of right knee meniscectomy, not work-related.[216]

¶ 107 In response to questions posed, Dr. Schumpert opined:

> Based upon the exposure scenario and the presence of diesel exhaust and acrylic paint dust and vapor, it appears [Rushford] suffered an acute exacerbation of unrecognized chronic obstructive pulmonary disease due to his smoking. . . . [Rushford] obviously had pneumonia of acute onset. Given his exposures, I feel it is unlikely he would have developed that condition had it not been for the exposures at his workplace.

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[210] Ex. 15 at 151.

[211] Ex. 15 at 147.

[212] Ex. 15 at 150.

[213] Ex. 15 at 152.

[214] Ex. 15 at 153.

[215] *Id*.

[216] Ex. 15 at 153-54.

> Since that time, [Rushford] has shown obvious evidence of chronic bronchitis. I do not believe [Rushford's] chronic bronchitis would have occurred had he not been a smoker. His large volumes of sputum production are completely consistent with chronic bronchitis, and are inconsistent with a diesel exhaust and/or acrylic paint dust exposure. . . .
>
> [Rushford's] pulse ox[i]metry monitored walking treadmill test failed to reveal evidence of a significant diffusion deficit; [Rushford] was clearly capable of getting oxygen from his lungs and into his blood. I am concerned, because of his elevation in heart rate while walking, that he is either extremely deconditioned, has an unrecognized cardiac problem, or that the severity of his [COPD] is underappreciated. These factors would not be related to the 2 October 2007 incident.[217]

¶ 108 Dr. Schumpert further opined that the October 2007 industrial exposure caused Rushford's pneumonia but not his chronic bronchitis and COPD.[218] However, he opined that Rushford's COPD was permanently aggravated by the industrial accident. He further opined that Rushford had reached MMI for the left lung pneumonia, which Dr. Schumpert believed was "the only condition I am able to completely attribute to his exposure."[219] He assessed Rushford with a 26% whole person impairment rating under the 5th edition of the *American Medical Association Guides to the Evaluation of Permanent Impairment*.[220]

¶ 109 On April 8, 2008, Dr. Schumpert wrote to Pozder in response to questions she had posed. Dr. Schumpert explained that he had concluded that Rushford suffered a permanent aggravation of his COPD because of his rapid decline in pulmonary function.[221]

¶ 110 On April 24, 2008, Dr. Hallenborg reported that Rushford had had an exacerbation of his lung condition with green and yellow mucus and visible blood. Dr. Hallenborg found crackles in both sides of the lung. His impression was bronchitis with incomplete resolution.[222]

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[217] Ex. 15 at 154.

[218] Ex. 15 at 154-55.

[219] Ex. 15 at 155.

[220] Ex. 15 at 156; L. Cocchiarella, M.D., MSc, *et al*. (eds.), *American Medical Association Guides to the Evaluation of Permanent Impairment*, 5th ed., AMA Press, 2005.

[221] Ex. 15 at 4.

[222] Ex. 3 at 44.

¶ 111 On May 9, 2008, Dr. Hallenborg responded to a letter from Pozder in which she had asked him to respond to Dr. Schumpert's IME report. Dr. Hallenborg stated that he found Dr. Schumpert's note to be accurate overall and he "differ[ed] little with the conclusions."[223] Dr. Hallenborg stated:

> I have diagnosed toxic fume inhalation with persistent bronchorrhea despite aggressive treatment with steroids, antibiotics, and a bronchoscopy. It has been my experience that these symptoms can persist for up to a year or longer and aggressive treatment should continue. The issue as to whether the patient has chronic obstructive pulmonary disease is difficult to discern. Although the patient smoked half a pack of cigarettes per day for 20 years, he has no history of asthma, or symptoms of chronic cough, shortness of breath, or wheezing, and certainly not symptoms such as he has at this time. Since only 15% of smokers develop chronic bronchitis, it is likely at least that he has suffered significant worsening of underlying mild bronchitis of an indeterminate length of time. I feel it is difficult to rate this patient at this time, and that within one year it may become more apparent whether this patient has developed an incapacitating illness.[224]

¶ 112 On May 21, 2008, Dr. Hallenborg saw Rushford for follow-up. Rushford was still coughing up "thick, bloody, purulent mucus, which he presented today at the office." Dr. Hallenborg's impression was COPD secondary to toxic inhalation with persistent infection.[225]

¶ 113 On June 3, 2008, Rushford reported to Dr. Hallenborg that he was extremely short of breath and coughing up greenish-yellowish mucus. On examination, Dr. Hallenborg noted, "Breath sounds are diminished although it seems that the patient is making a suboptimal effort."[226] X-rays taken that date revealed no significant changes except for a partial resolution of the left base atelectasis.[227]

¶ 114 On June 18, 2008, Pozder wrote to Rushford's then-counsel Andrew J. Utick and informed him that, based on the work restrictions Dr. Hallenborg set, Dick Anderson Construction could accommodate Rushford's return to work. Pozder further stated that

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[223] Ex. 3 at 45.

[224] Ex. 3 at 45-46.

[225] Ex. 3 at 51.

[226] Ex. 3 at 53.

[227] Ex. 3 at 54.

she would therefore terminate Rushford's temporary total disability (TTD) benefits on June 22, 2008.[228]

¶ 115 On July 2, 2008, Utick responded to Pozder's letter and disputed her termination of TTD benefits. He argued that Rushford was unable to return to work and further stated that in early June 2008, Rushford and Sharon moved to Bismarck, and therefore Rushford could not return to work in Helena.[229] On July 23, 2008, Pozder responded to Utick's letter, stating that Rushford had voluntarily terminated his employment with Dick Anderson Construction by not returning to work or contacting his employer about returning to work. Pozder denied Utick's request for reinstatement of benefits.[230]

¶ 116 On August 7, 2008, P.G. Mendoza, M.D., F.C.C.P., performed an IME of Rushford.[231] After reviewing medical records, examining Rushford, and taking a history, Dr. Mendoza stated that he agreed with Dr. Schumpert's opinions. He explained:

> I believe that Mr. Rushmoro [sic] had an occupational injury due to the fume exposure. He had recurrent lung infections, and with the bronchoscopy which Dr. Hallenborg performed, they found organisms that are significant for people with lung disease and smokers. In specific, Klebsiella pneumonia. Prior to the injury, Mr. Rushmore [sic] enjoyed a fairly good health pulmonary-wise. He had medical conditions such as hypertension and gastroesophageal reflux disease.[232]

¶ 117 On March 16, 2010, Richard L. Sellman, M.D., P.C., completed a medical records review of Rushford's case and responded to questions posed by MCCF's counsel. Dr. Sellman opined that his review of the records did not find any supporting documentation to indicate that Rushford had preexisting COPD.[233] He further opined that it was difficult to distinguish COPD from RADS, although RADS will get better over time while COPD will not, and that he found Rushford's medical findings to be consistent with either diagnosis.[234] Dr. Sellman also opined that Rushford's improvement in spirometry pointed away from a permanent aggravation of an underlying lung disease, and that smoking was a significant contributor to Rushford's

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[228] Ex. 4 at 1.

[229] Ex. 4 at 3-5.

[230] Ex. 4 at 6.

[231] Ex. 15 at 693-95.

[232] Ex. 15 at 693.

[233] Ex. 15 at 767.

[234] Ex. 15 at 768.

poor pulmonary function.[235] Dr. Sellman opined that Rushford's decline from November 2007 through August 2008 was due to a combination of toxic inhalation and smoking, but that it appeared smoking had the more significant contribution.[236] He further opined that Rushford had no ongoing medical issues which stem directly from his industrial injury.[237]

¶ 118 On August 17, 2010, Dr. Arndt assessed Rushford as having RADS secondary to paint fume and diesel exhaust exposure.[238]

¶ 119 On November 9, 2010, Rushford underwent a chest CT scan without contrast. The impression was multiple bilateral pulmonary nodules and interval resolution of suspected infectious changes at both lung bases.[239]

¶ 120 On January 25, 2011, Dr. Arndt found no evidence of an active infectious or inflammatory process within the lungs. Dr. Arndt noted that on this date, he discussed the option of starting methotrexate to assess for improvement in symptoms of cough and shortness of breath with Rushford.[240] A CT scan on that date showed no change in the bilateral pulmonary nodules.[241]

¶ 121 On January 25, 2011, Rushford underwent a PFT at the University of Minnesota Medical Center at Fairview. The technician found Rushford to give poor efforts on inspiratory side of flow volume loops, an invalid DLCO "because of poor efforts" and further opined "TLC not valid on this test because of inaccurate IVC from poor efforts on DLCO test."[242]

¶ 122 On February 9, 2011, Dr. Arndt responded to questions posed by MCCF's counsel. Dr. Arndt stated that Rushford's medical diagnosis is RADS, and that this diagnosis is supported by Rushford's onset of pulmonary symptoms after the occupational exposure, abnormal pulmonary function testing, and continued pulmonary symptoms after removal from the environment. Dr. Arndt opined that the absence of PFTs and symptoms prior to the exposure precludes making a definitive diagnosis of

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[235] *Id*.

[236] Ex. 15 at 769.

[237] *Id*.

[238] Ex. 15 at 785.

[239] Ex. 15 at 799-800.

[240] Ex. 15 at 803-05.

[241] Ex. 15 at 806-07.

[242] Ex. 15 at 809-10.

tobacco-induced COPD.[243] Dr. Arndt opined that Rushford required ongoing medical care to maintain MMI. He further opined that Rushford was not capable of working a regular full-time job because of his symptoms.[244]

¶ 123 On November 30, 2011, David W. Bonham, M.D., F.C.C.P., issued an IME report regarding Rushford's case. Dr. Bonham took a history from Rushford and conducted a physical examination.[245] On examination, Dr. Bonham found that Rushford's lungs were clear, but that Rushford "immediately had a coughing paroxysm" whenever he tried to take a deep breath. A chest x-ray revealed mild elevation of the left hemidiaphragm with lungs otherwise clear. Dr. Bonham conducted a PFT and found that Rushford exhibited good effort and cooperation, but exhibited severe coughing with deep breaths, making it impossible to perform the diffusion capacity maneuver. Dr. Bonham noted that the spirometry and lung volume measurements demonstrated moderately severe reduction in flow rates with evidence of air trapping. Dr. Bonham found no evidence of bronchodilator responsiveness.[246]

¶ 124 In response to questions posed by MCCF's counsel, Dr. Bonham opined that Rushford suffers from RADS, and also has small pulmonary nodules, minor atelectasis, and a mildly elevated left hemidiaphragm of uncertain cause or significance.[247] Dr. Bonham opined that Rushford's condition was an obstructive condition characteristic of RADS, although the elevation of the left hemidiaphragm could contribute to a reduction of his lung volume.[248] Dr. Bonham opined that the pulmonary nodules and elevated left hemidiaphragm are unrelated to the industrial injury.[249] Dr. Bonham found all of Rushford's PFTs to be consistent with his RADS diagnosis. He noted:

> I note that there has been a substantial amount of variation [in the PFT results]. Indeed that is the case during our evaluation as well. Unfortunately, when a patient has such severe inflammation of the airway, as the RADS has caused in this case, it results in a fair amount of variability of airflow measurements . . . .[250]

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[243] Ex. 15 at 818.

[244] Ex. 15 at 819.

[245] Ex. 15 at 857-59.

[246] Ex. 15 at 859.

[247] Ex. 15 at 860.

[248] *Id*.

[249] Ex. 15 at 862.

[250] Ex. 15 at 860.

¶ 125 Dr. Bonham further opined that Rushford's workplace exposure caused his acute respiratory illness. Dr. Bonham based this opinion on the fact that irritant materials were in the air and inhaled for a period of time, and Rushford experienced acute symptoms which he never had previously. Dr. Bonham noted that although Rushford was a smoker, no evidence indicated that he had a smoking-related lung disease.[251] Dr. Bonham opined that Rushford was likely at MMI given the passage of time since the exposure.[252]

¶ 126 As to Rushford's ability to return to work, Dr. Bonham explained:

> I believe that Mr. Rushford should not work in any environment where he is exposed to any degree of respiratory irritants . . . . I believe that it would be acceptable for Mr. Rushford to return to work, perhaps initially on a part-time and then ultimately on a full-time basis at a sedentary job. I do not believe that he can safely return to a job as a carpenter . . . . Whether his cough will impair his ability to function is a legitimate concern that Dr. Arndt raised, but my hope is that if Mr. Rushford is [in] an environment where he is working in clean air without being required to take deep breaths or exert himself particularly, that he would be able to function.[253]

¶ 127 In March 2012, David J. Hewitt, M.D., M.P.H., conducted a records review of Rushford's case. Dr. Hewitt summarized various medical records of Rushford's which dated as far back as March 27, 1990.[254] Dr. Hewitt opined that Rushford did not meet the diagnostic criteria for RADS due to: a documented history of respiratory complaints; a lack of a high-concentration exposure to irritants that would produce chronic respiratory effects; Rushford's failure to seek immediate medical assistance after the exposure; no symptoms which simulated asthma; PFTs which do not reliably show airflow obstruction; no methacholine challenge test; and a failure to rule out other types of pulmonary diseases or explanations for his respiratory complaints.[255] Dr. Hewitt suggested that Rushford's history of gastroesophageal reflux disease (GERD) was a likely explanation for his respiratory complaints.[256] He also suggested sleep apnea, obesity, the use of the drug Lisinopril for hypertension, and cigarette smoking, among other alternatives, could be the cause of his symptoms.[257] In answering the questions

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[251] Ex. 15 at 861.

[252] Ex. 15 at 862.

[253] Ex. 15 at 863.

[254] Ex. 14 at 1-41.

[255] Ex. 14 at 51-54.

[256] Ex. 14 at 54-56.

[257] Ex. 14 at 56-61.

posed, Dr. Hewitt opined that: Rushford's current respiratory complaints were not caused by his October 2007 industrial accident; Rushford had many other medical conditions which could account for his symptoms, including GERD, sleep apnea, medication side-effect, an Arnold-Chiari malformation with a C3 syrinx, and a potentially paralyzed or weakened left hemidiaphragm related to the malformation and/or associated surgery; and smoking. Dr. Hewitt opined that these conditions had not been fully evaluated or excluded as potential causes of Rushford's respiratory complaints.[258]

¶ 128 Dr. Hewitt further opined that Rushford was at MMI for his industrial exposure. He further opined that any symptoms Rushford would have experienced from his exposure would have quickly resolved with no long-term consequences.[259] Dr. Hewitt further opined that the diagnosis of RADS was not valid for Rushford's condition.[260] He recommended a complete evaluation of Rushford's GERD to determine its severity and better treat it. He also recommended additional evaluation of the persistently elevated left hemidiaphragm which was visible on chest x-rays, and a formal sleep study.[261] Dr. Hewitt also recommended a medication review and suggested that Rushford's Lisinopril prescription should be discontinued and replaced with a different antihypertensive medication which does not have cough as a side-effect.[262]

¶ 129 On April 24, 2012, Dr. Arndt wrote a letter "To whom it may concern" in which he requested that Rushford be allowed an evaluation by a neurologist.[263]

¶ 130 On July 19, 2012, Dr. Hewitt wrote to MCCF's counsel and responded to questions posed. Dr. Hewitt noted that he had reviewed an additional medical record from June 4, 2012; he had read surveillance reports dated March 5, April 25, May 30, and June 11, 2012; and he had reviewed surveillance footage from April 23, May 8, May 21, and June 4, 2012.[264] Dr. Hewitt stated that nothing in the reports or footage caused him to change the opinions he expressed in his March 2012 report.[265] Dr. Hewitt further opined, "The fact that [Rushford] was able to smoke and participate in horseshoe

[258] Ex. 14 at 61-62.

[259] Ex. 14 at 62.

[260] Ex. 14 at 61.

[261] Ex. 14 at 62-63.

[262] Ex. 14 at 63.

[263] Ex. 44.

[264] Ex. 15 at 67-68.

[265] Ex. 15 at 69.

matches for 2-3 hours without respiratory difficulty is not compatible with a diagnosis of RADS."[266] Dr. Hewitt further opined:

> [Rushford] had no significant respiratory issues while smoking cigarettes and playing horseshoes. Directly inhaled mainstream smoke would be a much more significant airway irritant than sidestream or passive cigarette smoke from other individuals. The fact that he was able to tolerate smoking and also be around other individuals who were smoking without respiratory difficulty strongly indicates that he would be able to tolerate normal work environments.[267]

¶ 131 Dr. Hewitt added that the fact that Rushford continues to smoke made the RADS diagnosis even less likely. He stated that smoking increases the risk of GERD and that Rushford's smoking must be considered a significant contributing factor to his respiratory complaints. Dr. Hewitt noted that, based on the records he reviewed in preparing his March 2012 report, he had understood that Rushford had quit smoking in 2008, but he now learned this was not the case.[268] Dr. Hewitt stated that GERD is well-known to be associated with chronic cough and other respiratory symptoms, and that GERD sufferers are advised to abstain from alcohol because it increases the respiratory symptoms from GERD.[269]

¶ 132 On August 13, 2012, Dr. Schumpert wrote to MCCF's counsel and stated that he had reviewed new information regarding Rushford's case, including medical records, video surveillance, and Dr. Hewitt's findings and information. Dr. Schumpert stated that he had reconsidered his previous opinions, which were "based on incomplete information," and that he agreed "entirely" with Dr. Hewitt's report. Dr. Schumpert opined that Rushford's pulmonary complaints were not due to an occupational exposure.[270]

¶ 133 On May 21 and 22, 2013, Rushford attended an FCE conducted by Hardine at Northwest Industrial Rehabilitation Services, Inc. The reasons for testing listed on Hardine's report are to determine Rushford's physical capabilities and for a "Medical-Legal evaluation." Hardine conducted three hours of testing on May 21 and two hours of testing on May 22. Hardine reported that Rushford was pleasant and cooperative, and that his patterns of movement and physiological responses were consistent with

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[266] *Id*.

[267] Ex. 15 at 69-70.

[268] Ex. 15 at 70.

[269] Ex. 15 at 70-71.

[270] Ex. 15 at 1.

maximal effort. She further noted that Rushford's performance was consistent over the two days with the exceptions of front carry and waist-level lifting, which both decreased on the second day. However, she concluded that Rushford's consistency of performance indicated that his testing should be considered valid.[271]

¶ 134 Hardine's observations include the following:

> Client reported respiratory breathing difficulty, shortness of breath, and dizziness and chest pain with walking activities. During the 6 minute walk test client stopped 3 times to rest. With front carry he noted increased respiratory distress and was coughing. Following the two hand carry he continued coughing for about an hour. . . . Activities requiring increased effort-static pushing, static pulling, stair climbing, and ladder climbing aggravated his respiratory symptoms. When he got to the top of the stairs he noted not only dizziness but light flashing and he waited a few minutes before he descended the stairs.[272]

¶ 135 Hardine found Rushford to have the following limitations: reduced respiratory support for strenuous activity; lifting, carrying, and reaching limited by shoulder and trunk weakness; forward bending and standing restricted by trunk/hip weakness; unable to squat, crouch, or lift to/from floor due to trunk/hip weakness and low endurance; and unable to sustain working above chest level.[273] Hardine opined that Rushford was currently restricted in his aerobic activity tolerance for work, and found he had the ability to sit up to four hours per day and lightly use his hands non-repetitively, but would need to change positions every 30 minutes, which would reduce his productivity. She found him to be restricted in walking, standing, bending, and weight handling, and unable to squat. She opined that he was "non-feasible for competitive employment at the levels indicated on the FCE form."[274]

¶ 136 On June 18, 2013, Dr. Arndt saw Rushford for a follow-up visit. In his notes, Dr. Arndt mentioned that he was participating in "horseshoe throwing, slow pace." He further noted, "Admits to smoking 'once in awhile' during stressful periods, 2-3 cigarettes. States this is not a weekly event."[275]

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[271] Ex. 7 at 1.

[272] Ex. 7 at 2.

[273] *Id*.

[274] *Id*.

[275] Ex. 20 at 50-52.

¶ 137 On October 9, 2013, Dr. Hewitt created a supplemental report to his IME in which he addressed matters raised in Dr. Arndt's July 24, 2013, deposition. Dr. Hewitt opined that Dr. Arndt's background did not appear to include the specific training necessary for Dr. Arndt to perform a reliable exposure assessment.[276] Dr. Hewitt further noted that his understanding of Rushford's working conditions on October 2 and 3, 2007, differed from Dr. Arndt's in that Dr. Arndt understood from Rushford's report that he was working in a "confined location," while Dr. Hewitt's investigation indicated that Rushford was working in a 20,000 square foot building with doors propped open for ventilation.[277] Dr. Hewitt also critiqued Dr. Arndt's conclusion that Rushford had a "large exposure," as Dr. Arndt offered no data to back up that opinion.[278] Dr. Hewitt further opined that Dr. Arndt did not have the expertise necessary to conclude that exposure to diesel exhaust caused RADS in Rushford's case.[279]

¶ 138 Additionally, Dr. Hewitt noted that Dr. Arndt did not review any of Rushford's pre-incident medical records before he made the RADS diagnosis, but rather relied on Rushford's self-report.[280] He disagreed with the diagnostic criteria Dr. Arndt used in Rushford's case, and further opined that Rushford's symptoms of headache, dizziness, and fogginess are not criteria for a RADS diagnosis and cannot be used to support such a diagnosis. He further opined that Dr. Arndt had not provided a rationale as to the mechanism by which Rushford's reported exposure would cause health effects which would require referral to a neurologist.[281] Dr. Hewitt also found Dr. Arndt's assertion that a negative methacholine challenge test years after exposure would not necessarily exclude a RADS diagnosis to be "highly questionable."[282]

¶ 139 Dr. Hewitt also opined that Dr. Arndt was incorrect in asserting that Rushford had no respiratory symptoms prior to the October 2007 exposure. Dr. Hewitt pointed to medical records from April 9, 2007, which noted evidence of reactive airways, cough, GERD, and not taking deep breaths. Dr. Hewitt stated, "This appears to be evidence of preexisting cough, potentially attributable to GERD, and needs to be considered in the context of his primary complaint after the exposure which has been cough."[283] Dr. Hewitt further opined that the finding of not taking deep breaths is consistent with

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[276] Ex. 17 at 1.

[277] *Id*.

[278] Ex. 17 at 2.

[279] *Id*.

[280] Ex. 17 at 3.

[281] Ex. 17 at 3-4.

[282] Ex. 17 at 4.

[283] Ex. 17 at 4-5.

the finding of an elevated left hemidiaphragm.[284] Dr. Hewitt also suggested that Rushford's concurrent Klebsiella pneumonia was coincidental. He asserted that Klebsiella is common cause of bronchitis in smokers, but it is not caused by exposure to diesel exhaust or paint dryfall.[285] Dr. Hewitt also rejected the results of Rushford's PFTs, stating that they were not valid results, and therefore he further asserted that Dr. Arndt could not draw conclusions from the PFT data.[286]

¶ 140 Dr. Hewitt also disagreed with Dr. Arndt's rule-out of GERD as the cause of Rushford's cough, asserting that further evaluation of the extent of Rushford's GERD would be necessary before reaching this conclusion.[287] Dr. Hewitt further opined that an individual with true severe RADS would be unable to smoke without increased cough and bronchospasm. He opined that Rushford's tendency to minimize his smoking and not to admit to resuming smoking until he became aware that he had been recorded doing so indicated that Rushford's self-reported medical history would also be questionable.[288] He further stated that while Rushford's report of various sensitivities is consistent with a RADS diagnosis, it would not be consistent for Rushford to have sensitivities to a variety of irritants and yet not be susceptible to cigarette smoke.[289]

¶ 141 Dr. Hewitt also opined that Rushford's complaint of burning chest pain is more consistent with GERD than RADS.[290] Dr. Hewitt also maintained that no evidence in published literature supports Dr. Arndt's contention that methotrexate is beneficial in treating RADS,[291] nor is there any evidence that azithromycin is beneficial in treating RADS.[292]

¶ 142 On October 10, 2013, Dr. Hewitt responded to MCCF's counsel's request for his comments on three specific contentions by Rushford's counsel: that certain symptoms of Rushford are due to his exposure incident and entitle him to a neurological evaluation; that Rushford is permanently totally disabled; and that Rushford's recurrent bouts of pneumonia prevent him from recovering from his exposure.[293] Dr. Hewitt

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[284] Ex. 17 at 5.

[285] *Id*.

[286] Ex. 17 at 6.

[287] Ex. 17 at 6-7.

[288] Ex. 17 at 8.

[289] *Id*.

[290] Ex. 17 at 9.

[291] *Id*.

[292] Ex. 17 at 10.

[293] Ex. 18 at 1.

responded that symptoms of photophobia, dizziness, and fogginess do not support a RADS diagnosis, and if these symptoms were secondary to the exposure incident, they would have quickly resolved after the exposure was eliminated. Dr. Hewitt further responded that neither azithromycin nor methotrexate have been demonstrated to be beneficial for the treatment of RADS. Finally, Dr. Hewitt opined that the video surveillance footage of Rushford that he reviewed was incompatible with a determination that Rushford is incapable of performing light physical labor and therefore does not support a determination that Rushford is not employable.[294]

¶ 143 On October 21, 2013, Dr. Hewitt completed a supplemental medical records review of this case.[295] On October 25, 2013, Dr. Hewitt submitted a supplemental report to his earlier IME. Dr. Hewitt noted that he had reviewed additional materials, including surveillance videos, Hardine's FCE report, Rushford's July 24, 2013, deposition, and certain articles about methacholine challenge testing cited by Dr. Arndt. Dr. Hewitt noted that the purpose of his report was to assess the validity of Rushford's RADS diagnosis, Rushford's work capabilities, and the significance of the literature cited by Dr. Arndt in light of the new materials.[296]

¶ 144 After reviewing video surveillance footage of Rushford which was recorded on April 29 and May 6, 13, 18, 20, 21, and 22, 2013, Dr. Hewitt stated:

> The reviewed video surveillance showed the individual was able to perform basic yardwork such as raking and gathering leaves into lawn bags, perform dethatching riding a lawn mower, mow in dusty conditions while riding a lawn mower, work on horseshoe pits for several hours, and participate in a horseshoe league on three different occasions. He also smoked over 50 cigarettes during the period of surveillance. At times, the individual was observed to smoke while talking with other individuals, smoke while performing various work activities, and perform work activities and horseshoe throwing with a lit cigarette in his mouth. He often took several quick inhalations of the cigarette immediately before finishing it. His cigarette use during the surveillance exceeded the level he reported to Dr. Arndt . . . . At no point during the surveillance video was there evidence of respiratory distress or coughing paroxysms. The absence of respiratory distress or coughing is not consistent with a RADS diagnosis, particularly given his ability to smoke cigarettes without coughing and work in dusty conditions. In particular, his ability to mow

[294] Ex. 18 at 2.

[295] Ex. 19.

[296] Ex. 21 at 1.

> with the riding lawn mower is irrefutable evidence that the individual does not have RADS based on the following: 1) he rode the lawn mower for approximately 30 minutes without respiratory protection; 2) he was observed to drive the lawn mower through visible dust clouds; 3) dust produced during the mowing was to a degree that it resulted in visible discoloration of his green t-shirt by the time he finished mowing; 4) at no time did the individual stop mowing due to respiratory distress or coughing. The ability to tolerate this degree of dust and respiratory irritant exposure without cough is totally inconsistent with a diagnosis of RADS. The video surveillance reinforces my initial opinion that Mr. Rushford does not have RADS.[297]

¶ 145 Dr. Hewitt further found that the activities Rushford performed during the video surveillance were inconsistent with his performance at the May 2013 FCE. Dr. Hewitt particularly noted Rushford's ability to pick up and move a wheelbarrow loaded with clay several times on May 18, 2013, and his ability to kneel or crouch while unloading the wheelbarrow.[298] He found that Rushford's complaints of respiratory limitations during the FCE due to coughing or shortness of breath were not consistent with Rushford's behavior on the video surveillance. Dr. Hewitt opined that the FCE results were "highly questionable." Dr. Hewitt further noted that he does not believe Rushford has any respiratory limitations due to the October 2007 exposure, and he also does not believe that this exposure has any bearing on any physical limitations Rushford may have for walking, lifting, or carrying.[299]

¶ 146 On November 26, 2013, Hardine issued a response to Rushford's surveillance video footage. Hardine noted that in many instances, Rushford leaned on objects, and in other instances, she found that the actions Rushford demonstrated in the footage – such as carrying a five-gallon bucket of water or pulling clay out of a mixer – were unquantifiable because the weight was unknown. Hardine noted that many of the activities Rushford engaged in, such as pushing, pulling, standing, walking, bending, and gripping, were within his tolerances if they were performed rarely and/or if Rushford was able to engage in these activities at his own pace.[300] Hardine summarized her response as follows:

> On occasion an individual may perform a task that is above their ability. However, this is not considered safe to perform on a day to day basis, at a

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[297] Ex. 21 at 3-4.

[298] Ex. 21 at 4.

[299] Ex. 21 at 5.

[300] Ex. 45 at 14-16.

> job. From the information reviewed this client performed many of the above listed activities in a self-modified manner. He took many breaks between activities. His quality of motion . . . including leaning on the rake or other objects, relying on arm assist to stand up from the ground, and slower paced walking were all modified ways to help him complete the tasks. It is unknown if this client experienced increased pain following the above tasks he performed under video surveillance. Client's demonstrated physical abilities in the FCE support his functional abilities as viewed in the video surveillance tapes.[301]

¶ 147 On January 2, 2014, Dr. Arndt wrote to Rushford's counsel and opined that Rushford's recent infectious respiratory condition was related to his October 2007 industrial injury. Dr. Arndt noted that the airway damage Rushford suffered had increased his susceptibility to respiratory infections, and that Rushford's use of prednisone and methotrexate for the treatment of RADS suppress his immune system and increase his risk for respiratory infections. Dr. Arndt opined that Rushford would always have a higher risk of respiratory infections because of his industrial injury.[302]

¶ 148 On January 9, 2014, Pozder wrote to Rushford and stated that, based upon Dr. Hewitt's reports and opinions and those of Richard Smith, PT, she had concluded that Rushford was physically able to return to work and therefore would terminate his TTD benefits in 14 days.[303]

Vocational and Medical Testimony

¶ 149 Karen Hardine, OTR/L, testified both at trial and during a deposition taken July 26, 2013. I found her to be a credible witness. Hardine owns Northwest Industrial Rehabilitation Services, which provides physical and occupational therapy.[304] She is licensed in the State of Minnesota with a certification in occupational therapy.[305] Hardine has been performing FCEs since 1985.[306] She estimated that she has performed 1000 FCEs in her career.[307]

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[301] Ex. 45 at 15.

[302] Ex. 36.

[303] Ex. 35.

[304] Hardine Dep. 6:10-14.

[305] Hardine Dep. 7:4-9.

[306] Hardine Trial Test. 4:24 – 5:2.

[307] Hardine Trial Test. 5:3-6.

¶ 150 Hardine testified that the FCE she performed in Rushford's case is the WorkWell format.[308] Hardine testified that the WorkWell FCE has validity tests or measures to ensure that the subject is putting forth full effort.[309]

¶ 151 Hardine opined that during the FCE, Rushford performed every task she asked of him to the best of his ability.[310] She explained that she reached that conclusion because she could observe the effort he used, his use of muscles, and his heart rate.[311] Hardine noted that she does not recall having conducted another FCE for a person with respiratory issues and that she typically conducts FCEs for people with musculoskeletal disorders.[312]

¶ 152 Hardine testified that nothing in Rushford's behavior suggested to her that he was malingering or giving less than maximum effort during his FCE.[313] She found his test results to be consistent.[314] Hardine testified that she believes Rushford put in "a fair amount of effort" on the six-minute walk test she conducted, and that she believed he was trying to walk quickly but could not because of breathing difficulties. She noted, "His heart rate went up some."[315] She further testified that after Rushford walked up a flight of 20 steps at her direction, he was breathing heavily and began to cough.[316]

¶ 153 Hardine testified that when she questioned Rushford about his daily activities, he did not volunteer that he played horseshoes at the Eagles Club nor did he mention that he did volunteer ground maintenance work there.[317]

¶ 154 During her deposition, Hardine testified that she did not believe that Rushford was competitively employable.[318] Hardine testified that from the FCE results, she concluded that Rushford's aerobic activity tolerance was low. She determined that he could sit for up to four hours, lightly use his hands non-repetitively, and tolerate some walking and standing. She opined that he probably could not work a full day, but that he

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[308] Hardine Dep. 8:9-19.

[309] Hardine Dep. 9:2-9.

[310] Hardine Trial Test. 16:21-24.

[311] Hardine Trial Test. 16:24-25.

[312] Hardine Trial Test. 13:24 – 14:9.

[313] Hardine Dep. 146:17 – 147:2.

[314] Hardine Dep. 147:3-7.

[315] Hardine Trial Test. 12:22 – 13:3.

[316] Hardine Trial Test. 13:19-23.

[317] Hardine Dep. 69:25 – 70:8.

[318] Hardine Dep. 45:5-8.

could work six or seven hours per day.[319] However, she added that she did not know if he could work in a "competitive type job" for more than six hours per day.[320]

¶ 155 Hardine testified that the surveillance footage of Rushford she viewed during her deposition did not change her opinion in regard to his abilities.[321] Hardine testified that in the footage she viewed, Rushford's completion of various tasks was "very modified activity" and she did not believe he could complete those tasks in an employment situation on a daily basis.[322] Hardine testified that in her opinion, Rushford could not perform the wheelbarrow work he engaged in during the video surveillance on a day-to-day basis based on his performance during the FCE.[323]

¶ 156 Hardine testified that there are some activities which Rushford would be able to do on a limited basis that he would not be able to do in a sustained manner.[324] Hardine opined that an FCE is a better measure of what Rushford can do on a daily basis than the activities he was recorded engaged in on the surveillance video because the FCE includes objective measurements.[325]

¶ 157 Hardine testified that prior to trial, she reviewed the critique of her FCE which was written by Richard Smith, PT, and she did not agree with his findings.[326] Hardine testified that she completely stands behind the opinions she rendered in her FCE report.[327]

¶ 158 Although I found Hardine credible, I have ultimately not given much weight to her FCE results. Clearly, Hardine found Rushford credible where I do not. I do not find it credible that Rushford completed hours of yardwork and recreational activities in the days prior to his FCE with no visible respiratory distress, and yet performed so poorly in the FCE while exhibiting debilitating bouts of coughing. While Hardine explained the discrepancies between the FCE and the video surveillance by noting that Rushford performed the activities in a "very modified" manner which would arguably accommodate some of the physical limitations – unrelated to the present industrial injury – which he unquestionably has, Hardine offered no explanation as to why

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[319] Hardine Trial Test. 17:21 – 18:8.

[320] Hardine Trial Test. 19:10-20.

[321] Hardine Trial Test. 5:12-22.

[322] Hardine Trial Test. 25:1-6.

[323] Hardine Dep. 101:14-24.

[324] Hardine Dep. 134:5-9.

[325] Hardine Trial Test. 8:8-23.

[326] Hardine Trial Test. 18:21-23; 20:4-6.

[327] Hardine Trial Test. 23:6-7.

Rushford was able to overcome his alleged respiratory difficulties in the situations captured on the surveillance, but yet would be unable to do so in an employment context.

¶ 159 Richard Smith, PT, testified at trial. I found him to be a credible witness. Smith owns Missoula Physical Therapy.[328] Smith has practiced in Missoula for 31 years. He is board-certified in orthopedic physical therapy.[329]

¶ 160 Smith testified that he is certified to perform the WorkWell FCE, and that his mentor is the developer of the testing procedures which became the WorkWell FCE.[330] Smith testified that he uses the WorkWell FCE in his own practice.[331] He testified that he works as a physical therapist and also performs approximately 50 or more FCEs annually. Smith testified that the majority of the FCEs involve workers' compensation cases and he receives referrals from insurance companies, physicians, and nurses.[332]

¶ 161 Smith testified that the purpose of the WorkWell FCE is to determine a person's maximum abilities. He opined that the WorkWell FCE is an objective, measurable test.[333] Smith testified that the FCE Hardine performed on Rushford was supposed to be a kinesiophysical test, but he does not believe she properly performed a kinesiophysical examination because she did not document kinesiophysical principles in her measurements or her notes. Smith asserted that Hardine noted subjective limitations, but did not note physical limitations or efforts during the test items. Smith opined that Hardine should have been noting whether Rushford's effort was light, medium, heavy, or maximum during each of the test items, and that she should have documented the objective basis for her determination, such as heart rate, musculoskeletal recruitment, and changes in body mechanics. Smith opined that the majority of Hardine's test notes were subjective.[334] Smith opined that Hardine did not perform the FCE in accordance with WorkWell's procedures and methodology.[335]

¶ 162 Smith further testified that Hardine's documentation of Rushford's strength testing records extremely low scores. Smith opined that the data Hardine recorded from her own strength measurements of Rushford prior to the start of the test indicated that

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[328] Trial Test.

[329] Trial Test.

[330] Trial Test.

[331] Trial Test.

[332] Trial Test.

[333] Trial Test.

[334] Trial Test.

[335] Trial Test.

Rushford should have been capable of performing more repetitions and with more weight than he did during the FCE.[336]

¶ 163 Smith testified that he personally reviewed the entire 19 hours of video surveillance footage of Rushford which was provided to him.[337] Smith testified that the video surveillance footage captured Rushford crouching, squatting, kneeling, grasping, standing, walking, climbing stairs, bending, reaching, lifting, carrying, pushing, and pulling. Smith opined that Rushford's movements appeared fluid and Smith did not observe pain behaviors or signs of trunk extensor weakness. Smith testified that he never observed Rushford favoring his right leg or exhibiting pain behaviors associated with low-back pain.[338]

¶ 164 Smith further testified that although Hardine's FCE results indicated that Rushford could pull 50 pounds and lift only 10 or 15 pounds at waist level on the short carry, on the video surveillance footage Rushford demonstrated an ability to move picnic tables which Smith estimated would require at least 100 pounds of force, and while Smith could not estimate how much weight Rushford lifted when he moved the tables, he opined that it far exceeded 15 pounds.[339] Smith testified that the video surveillance footage of Rushford moving picnic tables clearly demonstrates that his capabilities exceed those measured by Hardine during the FCE.[340]

¶ 165 Smith further testified that he did not observe Rushford cough or exhibit signs of shortness of breath during the 19 hours of video surveillance footage.[341]

¶ 166 Smith testified that the results from the six-minute walk test performed by Hardine during the FCE would indicate that Rushford can walk "rarely" – or less than five percent – during an eight-hour workday. However, Smith found in his observations of Rushford on the surveillance video footage that Rushford was capable of walking in excess of his FCE test results.[342]

¶ 167 Smith testified that when Rushford pushed the wheelbarrow loaded with clay, Smith observed heavy effort based on changes in Rushford's body mechanics. Smith

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[336] Trial Test.

[337] Trial Test.

[338] Trial Test.

[339] Trial Test.

[340] Trial Test.

[341] Trial Test.

[342] Trial Test.

testified that Rushford leaned to generate maximum force, and his body mechanics changed with a visible change in muscle recruitment.[343]

¶ 168 Patrick G. Arndt, M.D., testified at trial. I found him to be a credible witness. Dr. Arndt is board-certified in both pulmonary and critical care medicine.[344] He practices at the University Medical Center in Fairview, Minnesota,[345] where he is an associate professor of medicine.[346]

¶ 169 Dr. Arndt has treated Rushford since 2010.[347] Dr. Arndt testified that Rushford has been at MMI since the first time Dr. Arndt saw him.[348] He testified that when he first examined Rushford, he was concerned that Rushford might have RADS.[349] Dr. Arndt explained that RADS is Reactive Airways Dysfunction Syndrome. He stated:

> It's a disease process that people have nonspecific bronchial or airway reactivity after exposure to a high concentration of an airway irritant or chemical that can induce changes in the airways. Those patients present with cough, wheezing, dyspnea, and usually will have chest burning, as well.[350]

Once Dr. Arndt ruled out infectious complication through testing, he determined that the RADS diagnosis was correct.[351]

¶ 170 Dr. Arndt testified that prior to his industrial exposure, Rushford did not have a history of significant respiratory complaints which would have precluded Dr. Arndt from considering a RADS diagnosis.[352] He further testified that Rushford's symptoms began after a single, specific exposure.[353] He noted that Rushford had an exposure to a smoke, a fume, and a vapor in a very high concentration with irritant qualities.[354] He

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[343] Trial Test.

[344] Arndt Dep. 5:25 – 6:2.

[345] Arndt Dep. 4:16-19.

[346] Arndt Dep. 7:7-10.

[347] Arndt Trial Test. 7:3-5.

[348] Arndt Trial Test. 56:11-18.

[349] Arndt Dep. 16:21 – 18:22.

[350] Arndt Trial Test. 13:23 – 14:7.

[351] Arndt Dep. 16:21 – 18:22.

[352] Arndt Trial Test. 15:25 – 16:11.

[353] Arndt Trial Test. 16:14-18.

[354] Arndt Trial Test. 16:20-25.

further stated that Rushford's symptoms occurred within 24 hours and persisted for at least three months.[355] Dr. Arndt also found that Rushford exhibited dyspnea and simulated asthma with cough.[356] Dr. Arndt further testified that Rushford has had PFTs which indicate air flow obstruction.[357]

¶ 171 Dr. Arndt stated that credibility is very important with PFTs because PFTs are effort-dependent.[358] Dr. Arndt testified that he has no reason to believe that Rushford has not been giving maximum effort in his PFTs.[359] Dr. Arndt testified that he does not doubt the validity of any of Rushford's medical tests.[360] He further testified that he never questioned the validity of Rushford's complaints to him.[361]

¶ 172 Dr. Arndt acknowledged that Rushford has never had a methacholine challenge test performed on him.[362] Dr. Arndt testified that he did not perform this test when he first treated Rushford in 2010 because it would not have changed Dr. Arndt's RADS diagnosis; Dr. Arndt testified that individuals diagnosed with RADS can have a negative methacholine challenge several years after their exposure.[363]

¶ 173 Dr. Arndt testified that he disagrees with Dr. Schumpert's conclusion that Rushford's impairment rating is due to an aggravation of COPD, because Dr. Arndt believes that Rushford's limitations are due to RADS.[364]

¶ 174 Dr. Arndt further testified that other types of pulmonary diseases were ruled out in Rushford's case.[365] Dr. Arndt testified that no evidence indicates that Rushford suffers from COPD.[366] Dr. Arndt testified that since Rushford had never had a PFT or spirometry performed prior to his industrial accident, it cannot be said that he had a history of COPD because it was never previously diagnosed.[367] Dr. Arndt further

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[355] Arndt Trial Test. 17:13-16.

[356] Arndt Trial Test. 18:1-10.

[357] Arndt Trial Test. 19:2-10.

[358] Arndt Dep. 108:8-14.

[359] Arndt Dep. 125:8-11.

[360] Arndt Trial Test. 47:12-15.

[361] Arndt Trial Test. 76:22 – 77:1.

[362] Arndt Trial Test. 19:11-15.

[363] Arndt Trial Test. 19:20 – 20:10.

[364] Arndt Dep. 61:16-21.

[365] Arndt Trial Test. 20:11-23.

[366] Arndt Trial Test. 49:18-21.

[367] Arndt Dep. 38:5-21.

testified that the significant decline in Rushford's PFTs which occurred between November 15, 2007, and April 2008, is unlikely to be secondary to COPD unless Rushford experienced an acute exacerbation of COPD.[368] Dr. Arndt opined that Rushford's decline in breathing ability is secondary to RADS and not to cigarette exposure or COPD.[369]

¶ 175 Dr. Arndt noted that Rushford has been diagnosed with GERD. He added that GERD can cause coughing, but not dyspnea.[370] Dr. Arndt opined that the burning sensation in his chest that Rushford has complained of is consistent with RADS, although it can be caused by other etiologies, such as reflux disease.[371]

¶ 176 Dr. Arndt testified that he agrees with Dr. Bonham's evaluation, but not with Dr. Hewitt's.[372] Dr. Arndt testified that under the diagnostic criteria which have been established for RADS, the clinical judgment of the physician determines whether a chemical exposure is high enough to induce RADS, and in Rushford's case, Dr. Arndt believes the exposure was sufficient while Dr. Hewitt believes it was not.[373]

¶ 177 Dr. Arndt testified that prior to June 18, 2013, he was working under the assumption that Rushford was not smoking because Rushford had told him that he had quit smoking.[374] Dr. Arndt testified that when Rushford informed him at his June 18, 2013, appointment that he had resumed smoking, Dr. Arndt was under the impression that Rushford now smoked two or three cigarettes at a time on a less-than-daily basis when he felt particularly stressed.[375] Dr. Arndt further testified that even if Rushford smoked a few cigarettes a day on a daily basis, it would not change his RADS diagnosis.[376]

¶ 178 Dr. Arndt testified that the first time he learned that video surveillance footage existed of Rushford was on June 18, 2013, when Rushford volunteered that information during his medical appointment.[377] At trial, Dr. Arndt testified that he had not viewed any of the video surveillance footage of Rushford. However, he had read Dr. Hewitt's

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[368] Arndt Dep. 39:6-22.

[369] Arndt Dep. 39:23 – 40:4.

[370] Arndt Trial Test. 20:24 – 21:10.

[371] Arndt Dep. 59:17 – 60:3.

[372] Arndt Dep. 23:20 – 24:10.

[373] Arndt Dep. 28:10 – 29:12.

[374] Arndt Dep. 94:22 – 95:8.

[375] Arndt Dep. 53:17 – 54:4.

[376] Arndt Dep. 55:9-13.

[377] Arndt Dep. 90:12-18.

reports and viewed some still photographs of Rushford's activities.[378] He testified that the report and photographs do not change his opinion on the RADS diagnosis.[379] Dr. Arndt further testified that, based on a written description of the video surveillance which he reviewed, he does not believe that any of the activities Rushford was seen to engage in were very strenuous, and he does not believe that Rushford suffered any exposure to dust.[380] He further testified that if Rushford had been exposed to dust while he was moving a lawn mower, it would not change his opinion or diagnosis.[381] Dr. Arndt further testified that Rushford's resumption of smoking does not change Dr. Arndt's diagnosis.[382]

¶ 179 Dr. Arndt testified that he would rely on the results of Hardine's FCE where she determined that Rushford is not employable, and Dr. Arndt likewise believes that Rushford is not employable.[383] Dr. Arndt testified that he continues to believe that Rushford is not capable of working on a full-time basis and that he is not employable because of his cough and his shortness of breath.[384]

¶ 180 Dr. Arndt testified that Rushford is at an increased risk for infections including pneumonia not only because of the RADS but because he is on medications which suppress his immune system.[385]

¶ 181 Dr. Arndt acknowledged that the use of azithromycin in Rushford's situation would be an off-label use not approved by the FDA, although he believes that this use is justified based on several published studies.[386] Dr. Arndt stated that no studies have been conducted on the use of azithromycin specifically for RADS, but RADS is a rare disease.[387] Dr. Arndt acknowledged that his proposed use of methotrexate to treat Rushford's RADS would also be an off-label use and there are no peer-reviewed studies demonstrating its effectiveness in treating RADS.[388]

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[378] Arndt Trial Test. 39:16 – 40:1.

[379] Arndt Trial Test. 40:2-15.

[380] Arndt Trial Test. 41:20 – 42:10.

[381] Arndt Trial Test. 42:11-23.

[382] Arndt Trial Test. 43:8 – 44:8.

[383] Arndt Dep. 65:15-20.

[384] Arndt Trial Test. 53:16 – 54:9.

[385] Arndt Trial Test. 37:16 – 38:3.

[386] Arndt Dep. 67:12-23.

[387] Arndt Dep. 67:24 – 68:7.

[388] Arndt Dep. 68:8-18.

¶ 182 Dr. Arndt testified that Rushford needs to be seen by a neurologist because he exhibits symptoms outside Dr. Arndt's area of expertise.[389] Dr. Arndt testified that Rushford's need for a neurological examination is based upon Rushford's subjective complaints of seeing bright flashes of light, memory problems, and concentration problems.[390]

¶ 183 As noted above, I found Dr. Arndt credible and qualified. However, Dr. Arndt found Rushford credible where I do not. Dr. Arndt's reliance on Rushford's credibility is an inseparable component of Dr. Arndt's diagnosis and treatment of Rushford. For that reason, I must give Dr. Arndt's testimony and medical opinions less weight, even though Dr. Arndt is Rushford's treating physician.

¶ 184 David J. Hewitt, M.D., M.P.H., testified at trial. I found him to be a credible witness. Dr. Hewitt is a physician licensed to practice in the State of Montana. He works for Resources for Environmental and Occupational Health (REOH) in Missoula.[391] Dr. Hewitt is board-certified in general preventive medicine and public health. He is also board-certified in occupational medicine, and board-certified in toxicology.[392] Dr. Hewitt has published two articles relating to RADS: "Can RADS be iatrogenic?" and "Interpretation of the 'positive' methacholine challenge."[393] Dr. Hewitt testified that in one of these articles, he reached the conclusion that if someone is able to smoke, the diagnosis of RADS should be questioned.[394] Dr. Hewitt testified that he has reviewed or seen between 40 and 50 RADS cases during his career.[395]

¶ 185 Dr. Hewitt reviewed some of the video surveillance footage of Rushford. Dr. Hewitt testified that in reviewing the footage of Rushford using a riding lawnmower, it appeared to him that Rushford was repeatedly driving through clouds of dust.[396]

¶ 186 Dr. Hewitt testified that the significance of reviewing Rushford's pre-October 2007 medical records is to search for evidence of any preexisting health conditions which could be a confounder to a RADS diagnosis. Dr. Hewitt stated that these conditions would include a history of any respiratory complaints or symptoms of a history of reflux, which is strongly linked to asthma or respiratory symptoms such as a

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[389] Arndt Trial Test. 38:13-18.

[390] Arndt Dep. 113:20 – 114:11.

[391] Trial Test.

[392] Trial Test.

[393] Trial Test.

[394] Trial Test.

[395] Trial Test.

[396] Trial Test.

chronic cough. Dr. Hewitt testified that in Rushford's case, since he has a history of cervical spine surgery and abnormal chest x-rays, he would also consider the possibility of a diaphragm weakness or one-sided paralysis.[397]

¶ 187 Dr. Hewitt testified that he found some of the medical treatment Rushford had in early 2007 for respiratory symptoms and reflux to be significant.[398] Dr. Hewitt opined that the April 9, 2007, medical note about Rushford's sinusitis, chest congestion, and inability or unwillingness to draw a deep breath is a "clue" that something might be wrong with Rushford's diaphragm. Dr. Hewitt noted that the physician believed Rushford had some "reactive airway" condition.[399] Dr. Hewitt opined that from the medical records he reviewed, it appeared Rushford had respiratory problems prior to October 2007.[400]

¶ 188 Dr. Hewitt further testified that in his opinion, Rushford's elevated hemidiaphragm has never been properly evaluated.[401] Dr. Hewitt testified that it is possible that Rushford suffered nerve damage during his 1995 surgery on his head and neck, and that this could be the cause of the elevation of the left side of Rushford's diaphragm that has been consistently noted on x-rays. Dr. Hewitt explained that a person with a paralyzed diaphragm would not be able to inhale as much air into his lungs, and that this can cause shortness of breath.[402]

¶ 189 Dr. Hewitt explained that he believes Rushford's October 2007 pneumonia is not related to his workers' compensation claim because Klebsiella pneumonia is often found in smokers and often associated with reflux or aspiration. Dr. Hewitt opined that in October 2007, Rushford's smoking would have been a much greater source of exposure to particulates and irritating gases than the workplace exposure.[403]

¶ 190 Dr. Hewitt further testified that chronic bronchitis is typically seen in smokers, and that he would expect Rushford to continue to suffer from chronic bronchitis if he continues to smoke. This would also contribute to sputum production, which Dr. Hewitt would expect to get worse over time if Rushford's smoking continues.[404]

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[397] Trial Test.

[398] Trial Test.

[399] Trial Test.

[400] Trial Test.

[401] Trial Test.

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[404] Trial Test.

¶ 191 Dr. Hewitt further opined that Rushford's PFT results are not valid because of his coughing and the effort he expended during the tests. He believes the results are not interpretable.[405]

¶ 192 Dr. Hewitt testified that RADS is a controversial diagnosis that is hard to verify. He noted that in many purported cases, it is unknown what the patient's previous pulmonary function was, and in many purported cases, the exposure was also unknown.[406]

¶ 193 Dr. Hewitt testified that Lisinopril, which Rushford uses, is a medication used to treat high blood pressure, and that one of its known side effects is a dry cough. Dr. Hewitt testified that articles he reviewed indicate that people who take Lisinopril have this side effect in five to ten percent or more cases.[407]

¶ 194 Dr. Hewitt testified that cigarette smoke causes a much higher particulate exposure than diesel exhaust exposure, although both contain many of the same irritants. He testified that any diesel exhaust exposure Rushford would have experienced under his work conditions on October 2 and 3, 2007, would pale in comparison to the particulate exposure Rushford endures from cigarette smoke.[408]

¶ 195 Dr. Hewitt opined that Rushford would have reached MMI for his October 2007 exposure within a day or two of the incident, and that the exposure would, at most, have caused mild irritation of the eyes and respiratory tract.[409] Dr. Hewitt testified that he continues to be of the opinion that Rushford no longer has any respiratory limitations which could be plausibly related to the industrial exposure of October 2 and 3, 2007.[410]

Testimony of Claims Examiner

¶ 196 Mel Pozder testified at trial. I found her to be a credible witness. Pozder is MCCF's claims examiner. She began working for MCCF in January 2004. Pozder has recently adjusted Rushford's claim, although another claims adjuster was involved when he first filed the claim.[411]

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[405] Trial Test.

[406] Trial Test.

[407] Trial Test.

[408] Trial Test.

[409] Trial Test.

[410] Trial Test.

[411] Trial Test.

¶ 197 Pozder testified that MCCF initially accepted Rushford's claim partially under a reservation of rights. After Dr. Schumpert issued his IME report, MCCF fully accepted Rushford's claim. Pozder testified that MCCF accepted three conditions – Klebsiella pneumonia, acute exacerbation of COPD, and acute exacerbation of chronic bronchitis – based on Dr. Schumpert's initial report. Pozder testified that MCCF asked Dr. Schumpert to perform an IME because Dr. Schumpert had the expertise to opine whether Rushford's condition was work-related.[412] MCCF also paid the 26% impairment rating which Dr. Schumpert assessed.[413]

¶ 198 Pozder testified that she has never approved the neurological referral Dr. Arndt has requested.[414] Pozder further testified that she is not currently authorizing visits to Dr. Arndt because Dr. Hewitt's reports indicate these visits are for conditions unrelated to the industrial accident.[415]

CONCLUSIONS OF LAW

¶ 199 This case is governed by the 2007 version of the Montana Workers' Compensation Act (WCA) since that was the law in effect at the time of Rushford's industrial accident.[416] Rushford bears the burden of proving by a preponderance of the evidence that he is entitled to the benefits he seeks.[417] I have concluded that Rushford has not met his burden.

Issue One: Whether Petitioner is permanently totally disabled.

¶ 200 Under § 39-71-702(1), MCA, a worker who is no longer temporarily totally disabled and who meets the definition of permanently totally disabled as found within § 39-71-116, MCA, is eligible for PTD benefits. Section 39-71-116(25), MCA, defines permanent total disability as a physical condition resulting from an injury for which a worker does not have a reasonable prospect of physically performing regular employment after that worker reaches MMI.

¶ 201 In Rushford's case, his treating physician Dr. Arndt has opined that Rushford is not competitively employable. Dr. Arndt bases this opinion, in part, on Hardine's FCE

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[412] Trial Test.

[413] Trial Test.

[414] Trial Test.

[415] Trial Test.

[416] *Buckman v. Montana Deaconess Hosp*., 224 Mont. 318, 321, 730 P.2d 380, 382 (1986). (Citations omitted.)

[417] *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).

report. Rushford argues that he has been permanently totally disabled since Dr. Schumpert found him at MMI in 2007. Rushford argues that his and Sharon's testimony, and contemporaneous medical records, prove that he was not capable of light-duty work prior to June 2008.[418] He further argues that Dr. Arndt disapproved all of the job analyses which were presented to him. Rushford also notes that Dr. Bonham opined that in his experience with similar patients, "finding appropriate employment is certainly problematic."[419]

¶ 202 MCCF argues that Rushford's testimony is not credible and that all of his complaints are subjective. MCCF argues that Rushford's alleged lack of credibility undermines the RADS diagnosis because it is based on self-reporting, and that Rushford's PFT results lack validity because they are effort-dependent. MCCF notes that no coughing or shortness of breath is evident on the video surveillance footage of Rushford. MCCF specifically points to the video surveillance footage of Rushford dethatching and mowing under dusty conditions. It argues that Rushford's lack of respiratory problems while performing this labor demonstrates that he does not have RADS.

¶ 203 MCCF further argues that if the Court accepts Dr. Hewitt's opinion that Rushford would have fully recovered from his October 2007 industrial exposure within two days, then Rushford would have been able to return to work since that time, and his claim that he is now permanently totally disabled must be denied.

¶ 204 MCCF argues that although Dr. Arndt is Rushford's treating physician, Dr. Hewitt is more qualified than Dr. Arndt to render opinions in this instance, because Dr. Hewitt's focus is on occupational exposures while Dr. Arndt's focus is on respiratory problems irrespective of the cause.[420] MCCF further argues that Dr. Hewitt's opinion is entitled to greater weight because Dr. Hewitt had access to, and made use of, better data than Dr. Arndt. MCCF notes that Dr. Hewitt reviewed the surveillance footage while Dr. Arndt did not.[421]

¶ 205 As a general rule, the opinion of a treating physician is accorded greater weight than the opinions of other expert witnesses. However, a treating physician's opinion is not conclusive. To presume otherwise would quash this Court's role as fact-finder in questions of an alleged injury.[422] In determining whether the weight of conflicting

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[418] Petitioner's Trial Brief, Docket Item No. 123, at 19.

[419] Petitioner's Trial Brief at 19, citing Ex. 49 at 7.

[420] Respondent's Trial Brief, Docket Item No. 121, at 7-8.

[421] Respondent's Trial Brief at 8.

[422] *EBI/Orion Group v. Blythe*, 1998 MT 90, ¶¶ 12-13, 288 Mont. 356, 957 P.2d 1134. (Citation omitted.)

medical opinions outweighs the opinion of a treating physician, this Court has considered such factors as the relative credentials of the physicians,[423] and the quality of evidence upon which the physicians based their respective opinions.[424] In the present case, as MCCF pointed out, Dr. Hewitt's expertise lies in the area of occupational exposure while Dr. Arndt's expertise is respiratory conditions. Both have different, yet appropriate qualifications regarding the present case and I am satisfied with both their credentials. However, it is clear that Dr. Hewitt had a higher quality of evidence upon which to base his opinions. Specifically, unlike Dr. Arndt, Dr. Hewitt reviewed an extensive collection of Rushford's pre-October 2007 medical records. Moreover, unlike Dr. Arndt, Dr. Hewitt also reviewed the video surveillance footage of Rushford.

¶ 206 Given Rushford's lack of credibility, I must conclude that he has not met his burden of proving that he is permanently totally disabled. The surveillance footage submitted into evidence shows Rushford engaged in physical activities which, as I noted in the findings above, cause me to reject Hardine's opinion that the FCE results she obtained were reliable. While it is clear from the medical records which predate Rushford's October 2007 industrial exposure that Rushford has some significant pre-existing physical limitations, it is equally clear that Rushford was nonetheless able to perform his job duties for Dick Anderson Construction in spite of these limitations. Moreover, I cannot find it more probable than not that Rushford presently has a physical condition resulting from the industrial injury which is the subject of the present case. I conclude that Rushford has not met his burden of proving that he is permanently totally disabled.

Issue Two: Whether Respondent is liable to Petitioner for retroactive temporary total disability benefits.

¶ 207 Rushford argues that he is entitled to TTD benefits from June 22, 2008, when Pozder informed Rushford's then-counsel of their termination, until April 8, 2011, when Pozder reinstated Rushford's TTD benefits.[425]

¶ 208 MCCF argues that an injured worker cannot create a wage loss by moving out of state. MCCF argues that the evidence demonstrates that Dick Anderson Construction offered Rushford alternative work at his time-of-injury wage which Rushford chose not

[423] *See Barnea v. Ace Am. Ins. Co.*, 2007 MTWCC 58, ¶ 43.

[424] *See Durham v. State Comp. Ins. Fund*, 1998 MTWCC 87, ¶¶ 19, 44.

[425] Petitioner's Trial Brief at 18-19.

to accept. MCCF argues that Rushford's voluntary decision not to work is the cause of his wage loss and he is therefore not entitled to TTD benefits.[426]

¶ 209 Under § 39-71-701(4), MCA, if the treating physician releases a worker to return to a modified or alternative position that the worker is able and qualified to perform with the time-of-injury employer at an equivalent or higher wage, then the worker is no longer eligible for TTD benefits even though he has not yet reached MMI. In the present case, Rushford does not deny that he was released to return to work with restrictions prior to obtaining MMI. The testimony of Stonehouse, the resource manager at Dick Anderson Construction, was that the company would have been able to accommodate the restrictions Rushford had at the time he was released to return to work. I found this testimony credible.

¶ 210 Although Rushford argues that he is entitled to the reinstatement of his TTD benefits for this time period because he had relocated to Bismarck and was therefore unable to accept the modified job position, Rushford has not offered any legal authority in support of his argument.

¶ 211 I conclude that MCCF is not liable to Rushford for retroactive TTD benefits for the time period of July 2, 2008, through April 8, 2011.

Issue Three: Whether Respondent is liable for Petitioner's referral to a neurologist as recommended by his treating physician, Dr. Arndt; and

Issue Four: Whether Respondent is liable for Petitioner's ongoing medical treatment as recommended by his treating physician, Dr. Arndt.

¶ 212 Rushford argues that his October 2007 industrial exposure caused his current respiratory condition and that MCCF should therefore be held liable for his ongoing medical treatment as recommended by Dr. Arndt, his treating physician. Rushford contends that this should include a referral to a neurologist as recommended by Dr. Arndt.

¶ 213 MCCF argues that Dr. Arndt testified that Rushford has been at MMI since he first saw him, and that, even if MCCF were to authorize Rushford's treatment with methotrexate and azithromycin, Dr. Arndt believed Rushford would still not be able to return to work. MCCF argues that continuing treatment with Dr. Arndt is therefore secondary medical services, and that Rushford would only be entitled to these services if he met the requirements of § 39-71-704(1)(b), MCA.

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[426] Respondent's Trial Brief at 11-12.

¶ 214 It is undisputed that Rushford suffered an industrial exposure to fumes on October 2 and 3, 2007, which caused him to seek medical attention. As set forth in the findings above, Dr. Pujol, who treated Rushford shortly after the exposure, found mild restriction and noted that Rushford seemed unable to take deep breaths.[427] Dr. Hallenborg, who treated Rushford in the following months, diagnosed Rushford with severe bronchiolitis and subsequently Klebsiella pneumonia. Dr. Hallenborg also discovered the persistent elevation in Rushford's left hemidiaphragm.[428]

¶ 215 After an IME in January 2008, Dr. Schumpert found Rushford to have two work-related conditions: Klebsiella pneumonia and an acute exacerbation of chronic bronchitis. Dr. Schumpert opined that Rushford had non-work-related COPD, although he also opined that Rushford's underlying COPD was permanently aggravated by the industrial injury.[429] In August 2012, Dr. Schumpert reconsidered his opinions after reading Dr. Hewitt's report and opined that Rushford's pulmonary complaints were not work-related.[430]

¶ 216 In March 2012, Dr. Hewitt opined that Rushford's current respiratory complaints were not attributable to the October 2007 industrial exposure, but rather could be explained by other causes.[431] In October 2013, after reviewing additional materials, Dr. Hewitt again opined that Rushford had no respiratory limitations due to his October 2007 industrial exposure.[432]

¶ 217 From the evidence presented in this matter, and from my finding Rushford wholly lacking in credibility, I do not believe that it is more probable than not that any respiratory problems Rushford currently suffers from are related to his October 2007 industrial exposure. He has not met his burden of proof in this regard. Therefore, I conclude that MCCF is not liable for further medical treatment recommended by Dr. Arndt, including a referral to a neurologist.

Issue Five: Whether Petitioner is entitled to attorney fees and costs; and

Issue Six: Whether Petitioner is entitled to a penalty.

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[427] *See supra* ¶ 92.

[428] *See supra* ¶¶ 93-97.

[429] *See supra* ¶¶ 104-06.

[430] *See supra* ¶ 130.

[431] *See supra* ¶¶ 125-26.

[432] *See supra* ¶ 143.

¶ 218 Since Rushford is not the prevailing party, he is not entitled to his costs, attorney fees, or a penalty.[433]

Issue Seven: Whether Respondent is liable to Petitioner for any unpaid medical bills.

¶ 219 At the close of trial, Rushford's counsel conceded that no outstanding medical bills remain unpaid. Therefore, this issue is moot.

JUDGMENT

¶ 220 Petitioner is not permanently totally disabled.

¶ 221 Respondent is not liable to Petitioner for retroactive temporary total disability benefits.

¶ 222 Respondent is not liable for Petitioner's referral to a neurologist as recommended by his treating physician, Dr. Arndt.

¶ 223 Respondent is not liable for Petitioner's ongoing treatment as recommended by his treating physician, Dr. Arndt.

¶ 224 Petitioner is not entitled to attorney fees and costs

¶ 225 Petitioner is not entitled to a penalty.

¶ 226 The issue of Respondent's liability to Petitioner for unpaid medical bills is moot.

¶ 227 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 30th day of May, 2014.

(SEAL)

/s/ JAMES JEREMIAH SHEA
JUDGE

c: Richard J. Pyfer
Larry W. Jones

Submitted: April 30, 2014

[433] §§ 39-71-611 and -2907, MCA.