

IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

1995 MTWCC 32

WCC No. 9303-6720

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JAMES L. SMITH

Petitioner

vs.

STATE COMPENSATION INSURANCE FUND

Respondent.

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FINDINGS OF FACT, CONCLUSIONS OF LAW AND JUDGMENT

**Summary:** Claimant seeks indemnity and rehabilitation benefits, attorneys fees, and costs based on accident while driving in the course and scope of employment.

**Held:** Based on evidence in the case, including numerous discrepancies in statements and claims made by claimant, the Court reached a firm conviction that claimant has lied about his back condition in the attempt to obtain workers' compensation benefits. Claimant is not entitled to benefits.

**Topics:**

**Witnesses: Credibility.** Based on evidence in the case, including numerous discrepancies in statements and claims made by claimant, the Court reached a firm conviction that claimant has lied about his back condition in the attempt to obtain workers' compensation benefits. Claimant is not entitled to benefits.

The trial of this case was initially set for the week of May 10, 1993, but was set over to the fall term of Court for Helena. The trial was held on October 26, 1993, in Helena, Montana. The petitioner, James L. Smith (claimant), was not present but was represented by Mr. Stephen C. Pohl. Respondent, State Compensation Insurance Fund (State Fund), was represented by Mr. Oliver H. Goe. The case was not submitted for decision until December 2, 1994, due to post-trial depositions, motions and extensions of time for the submission of proposed findings of fact and conclusions of law.

Trial transcript: The transcript of this case is in two parts. One part contains the Court's preliminary discussion with counsel and the opening statements. It is entitled *Partial Transcript* and will be referred to as Tr. I. The other part contains the testimony of Harold Lesh and Paul Bogumill. It is entitled *Excerpt From The Court Proceedings* and will be referred to as Tr. II.

Witnesses at trial and by deposition: Harold Lesh and Paul Bogumill testified at trial. In addition, the parties have submitted the depositions of claimant, Dr. John Campbell, Bryan Gillette, Kent Lombard, Fred Yaeger, Kenneth Madden, Ronald Sexton, Monte Ewald, Rob Christi, Paul Tunkis, Bob Boyd, Sandy Maus, Dwaine Cline, Larry Cloninger and Dr. Philip Cory.

Exhibits: Trial exhibits 1 and 4 were admitted. Exhibits 2 and 3 were refused. Exhibit 2 is a report of Dr. Cheryl Blank, a psychologist. Exhibit 3 consists of medical notes for claimant during his incarceration at the Gallatin County Detention Center. Both exhibits were offered by claimant and were refused because they were not timely identified. (Tr. I at 83-84.)

On June 3, 1994, the claimant again requested that the Court admit the records of Dr. Blank, the Detention Center physician, and two other physicians. After a hearing on the request, the Court granted claimant leave to take depositions of Dr. Blank and the other physicians. (June 3, 1994 Minute Book Hearing #2509.) Claimant did not avail himself of that opportunity.

Numerous exhibits were also attached to the various depositions. In their proposed findings of fact and conclusions of law, neither party has pursued any objection to any of those exhibits. Therefore, these exhibits are admitted into evidence. ARM 24.5.322(5).

Judicial notice: Subsequent to trial the Court took judicial notice of official records of the Eighteenth Judicial District Court for Gallatin County in the matter of ***State of Montana v. James Leroy Smith***, No. 94-03. It did so because the documents that were attached to the State Fund's Request for Judicial Notice were part of the Court record, and had already been brought to the Court's attention. The basic information concerning claimant's criminal conviction for defrauding the State Fund had already been furnished to the Court preceding the trial. (Tr. I.) Claimant was convicted of drawing temporary total disability benefits while working. The issue in this case is his permanent disability, if any. The Court has made its own determination concerning the present claims and has given no weight to the criminal proceedings and conviction.

Issues: The parties have phrased the issues to be determined by the Court as follows:

1. The amount and extent of Claimant's entitlement to temporary total disability benefits under the Workers' Compensation Act.
2. The amount and extent of Claimant's entitlement to permanent total disability benefits under the Workers' Compensation Act.
3. Alternatively, the amount and extent of Claimant's entitlement to permanent partial disability benefits under the Workers' Compensation Act. *Subject to Defendant's Motion for Partial Summary Ruling.*
4. Alternatively, the amount and extent of Claimant's entitlement to retraining benefits under the Workers' Compensation Act. *Subject to Defendant's Motion for Partial Summary Ruling.*
5. Whether Claimant is entitled to an award of costs and attorney's fees.
6. Whether Defendant is liable for a 20 percent increase in benefits for unreasonable delay and refusal to pay benefits under Mont. Code Ann. § 39-71-2907.

(Final Pretrial Order at 3.) The italicized language is contained in the Final Pretrial Order. The motion to which the italicized language refers is a motion filed by the State Fund on March 30, 1993. The motion sought dismissal of claimant's alternative requests for permanent partial and retraining benefits on the ground that those issues had not been mediated. The State Fund subsequently moved to withdraw the motion and the motion to withdraw was granted. (Order Dismissing Motion for Summary Ruling (May 7, 1993).)

The issues are further limited by representations the parties made at trial. Claimant's attorney represented that claimant has been incarcerated since May 26, 1993. (Tr. I at 69.) Since prisoners are precluded from receiving workers' compensation benefits, § 39-71-744, MCA, the Court will only consider claimant's entitlement to benefits, if any, accruing through May 25, 1993. Claimant's attorney also conceded that claimant had reached maximum healing at the time his temporary total disability benefits were terminated on September 21, 1992, and that temporary total disability benefits are not at issue. (Tr. I at 54-55, 68-69.)

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Having considered the Final Pretrial Order, the testimony presented at trial, the demeanor and credibility of the witnesses appearing at trial, the exhibits, the depositions and the arguments of the parties, the Court makes the following:

### FINDINGS OF FACT

1. At the time of trial claimant was 46 years old. (Smith Dep. at 47.) On some of his employment applications he has represented that he attended high school through grade 12. (Smith Dep. Exs. 17 and 18.) In fact he attended school only until the tenth grade and did not graduate. (Smith Dep. at 116, 118.) He does not have a GED. (*Id.* at 116.)
2. Primarily, claimant has worked on dairy farms and as a truck driver. Several of his adult years were spent in prison. His recent work history has been as a truck driver and has been unstable. He has had difficulty with each of the last six reported employers who employed him as a truck driver. He was discharged by Bob Boyd Trucking (Boyd) for failing to show up for loading his truck. (Boyd Dep. at 28.) He was discharged by Yaeger Trucking (Yaeger) after he wrecked a truck and was cited for careless driving. (Yaeger Dep. at 8.) On an application for employment with Boyd Trucking, he stated that his reason for leaving V.K. Putman was "because of having wife on truck" (Smith Dep. Ex. 18), while on another application made with Yaeger Trucking he stated that he left because "just had words." (Smith Dep. Ex. 17.) On the Boyd application he stated that he left Big Sky Asphalt because he "got put in jail and put me on part time" (Smith Dep. Ex. 18), while on his Boyd application he stated he left because "wouldn't pay." (Smith Dep. Ex. 17.) He listed Tri-Line as a prior employer on his Boyd application but not on his Yaeger application (*Id.*), and stated that he left because "stayed out too long." (Smith Dep. Ex. 18.) On his Yaeger application, but not on his Boyd application, he listed K&K Trucking and stated that he left because "messing with my money." (Smith Dep. Ex. 17.)
3. On November 26, 1990, claimant told Larry Cloninger, a Bozeman Job Service employee, that he could no longer do physical work. (Cloninger Dep. at 16.) He said that "he had medical problems, heart and diabetes." (*Id.*)
4. On October 18, 1991, claimant applied for employment with Yaeger Trucking and was hired.
5. On October 24, 1991, while driving in the course and scope of his employment with Yaeger, his semi-trailer truck went off the road and overturned. The cause of the accident is disputed; the fact of the accident is not.
6. Claimant was thrown about the truck cabin and injured.

### Acceptance of Liability and Payment of Benefits

7. At the time of the October 24, 1991 accident, Yaeger Trucking was insured by the State Fund.

8. The State Fund accepted liability for the accident and it commenced paying temporary total disability benefits effective November 1, 1991. (Tr. II at 26-27; Smith Dep. Ex. 1.)

#### Events and Medical Treatment Following Injury

9. Claimant was taken to the emergency room at a hospital in Glendive, Montana, following the accident. He testified that the staff at the emergency room kicked him out of the hospital because he refused to permit doctors to stitch a laceration of his scalp. (Smith Dep. at 109.) No record of the Glendive emergency room treatment has been submitted to the Court

10. Claimant returned by bus to Bozeman, Montana, where he was residing. (Smith Dep. at 109.)

11. On October 26, 1991, claimant sought treatment at the emergency room of the Bozeman Deaconess Hospital. (Ex. 1 at 6.) The emergency room record reads in part:

Rolled a semi & was seen in Glendive. Pt. says he was "told to leave the hospital." Came to Bozeman via bus. Pt. is sore & has great difficulty with movement. Mainly c/o (L) hip pain (L) leg pain. Moves all extremities. Currently alert & oriented but states he was confused this AM..

(*Id.*)

12. On October 28, 1991, claimant called his probation officer, Kent Lombard (Lombard), and told him he had been injured on the job and "was now on crutches and neck brace." (Lombard Dep. at 20.) No credible evidence has been presented to the Court to show that claimant needed either crutches or a neck brace, or that he in fact ever used either.

13. On October 30, 1991, claimant was seen by Dr. John C. Campbell, an orthopedic surgeon practicing in Bozeman. Dr. Campbell's office note for the visit reads in part:

He evidently had jackknifed and caused him to have an accident. He was seen in a hospital where he was evaluated and they performed some x-rays on his neck and back, he says (he is not a good historian, however). He is here com-

plaining of neck and back pain. He describes his lumbar pain as being in the left lumbar area going into this buttock going into this foot.

(Ex. 1 at 34.) Dr. Campbell observed a large bruise, fifteen to twenty centimeters in diameter, on claimant's lower back. (Campbell Dep. at 18.) He also observed that claimant was unable to toe and heel walk because of pain on the left side of his back and "assume[d] that **he was putting most of his weight on his right leg.**" (*Id.* at 19, emphasis added.)

14. Between October 24, 1991 and November 11, 1991, claimant called Mr. Yaeger two or three times requesting that he be allowed to return to work. (Yaeger Dep. at 8; Smith Dep. at 109-110.) Claimant told Yaeger that he was ready to go back to work. (*Id.*) When asked at his deposition whether he told Yaeger that he "would be back to work in about a week" claimant testified, "I think I said something of that sort." (Smith Dep. at 109-110.) Mr. Yaeger "held him [claimant] off " because he was waiting to see if his insurance company would provide coverage for claimant in light of his accident. (Yaeger Dep. at 8.)

15. Claimant failed to keep a follow-up appointment scheduled with Dr. Campbell for November 8, 1991.

16. On November 11, 1991, Yaeger's insurance company excluded claimant from coverage under Yaeger's policy. (Yaeger Dep. at 7.) In a telephone call on or shortly after November 11, 1991, Yaeger informed claimant that he could no longer employ him because of the insurance exclusion. (*Id.* at 8-9.)

17. On November 15, 1991, claimant asked his probation officer, Kent Lombard, for permission to leave Montana so he could take a job at a dairy in Minneapolis. (Lombard Dep. at 21.)

18. Claimant returned to Dr. Campbell on November 20, 1991. (Ex. 1 at 34.) He told Dr. Campbell that he was still having back pain but that his neck pain had improved significantly. (*Id.*) His range of motion of the neck was within normal limits. (Campbell Dep. at 20.) He was able to move around a lot better. (*Id.*) Dr. Campbell reviewed x-rays of the lumbar and neck region and noted degenerative changes consistent with aging. (*Id.* at 21.) He diagnosed claimant as having a cervicolumbar strain that was resolving. (Ex. 1 at 33.) He told claimant that his condition was resolving and told him to take another three weeks off of work. (Campbell Dep. at 22-23.)

19. Dr. Campbell told claimant on November 20, 1991, that a majority of patients with conditions similar to that of claimant "get well" within three weeks without any permanent disability. (Campbell Dep. at 22.)

20. Claimant returned to Dr. Campbell on November 25, 1991, with a new complaint of pain in his *right* buttock. (Campbell Dep. at 23.) No neck pain was noted and his condition was otherwise unchanged. (*Id.* at 23-24.)

21. On December 2, 1991, claimant drove to Billings, where the wrecked truck was being repaired. He retrieved his personal belongings and took a number of items belonging to Yaeger. (Yaeger Dep. at 10-11 and Dep. Ex. 1.)

22. On December 4, 1991, Probation Officer Lombard received a call from a job service employee complaining that claimant was at the job service office and was abusive and threatening. (Lombard Dep. at 22.) In later discussing the incident with Lombard, claimant said that "[h]e wanted a job, and he wanted top-of-the-line jobs." (*Id.*)

23. On December 6, 1991, claimant called Lombard and told him that he was not going to take the dairy job in Minnesota because of his injuries. (Lombard Dep. at 21.)

24. On December 10, 1991, claimant was again seen by Dr. Campbell. (Ex. 1 at 33; Campbell Dep. at 25.) At that time he complained that his pain had expanded to include his left shoulder and arm and his left leg and ankle. (*Id.*) Dr. Campbell ordered an MRI. (*Id.*)

25. On December 11, 1991, claimant went to the Bozeman Job Service in search of a job. He told job service employees that "he was totally cured and he could do anything and was really trying to get out on very, very physical jobs." (Cloninger Dep. at 19.)

26. Claimant underwent an MRI on December 18, 1991. (Ex. 1 at 33.) His cervical MRI showed some mild herniation at C3-4 on the left side as well as at C4-5; his lumbar spine was normal. (*Id.* at 32-33.) Dr. Campbell testified that the C4-5 bulge is insignificant. (Campbell Dep. at 80.) In his office note of December 18th, the doctor commented, "I am at a loss as to anything I can do for this man." (Ex. 1 at 32.) He was also unable to determine the reason for claimant's continued complaints of pain (Campbell Dep. at 27) and referred claimant to a pain clinic in Bozeman for further evaluation and possible treatment (Ex. 1 at 32).

27. Dr. Philip C. Cory is an anesthesiologist who specializes in chronic pain management. (Cory Dep. at 5.) He is associated with the Bozeman pain clinic.

28. Dr. Cory examined claimant on January 6, 1992. (Cory Dep. at 12-13.) At that time, claimant was complaining of low-back pain with radiation into the left hip and leg, mid-back pain on the left side, and some neck pain with headaches. (*Id.*) Dr. Cory detected muscle spasm "about a third of the way bilaterally" up claimant's back. (*Id.* at 14.) He found no evidence of nerve root compression or nerve irritation. (*Id.* at 16.) However, he noted a

"transitional vertebra" at the S1-2 level. (*Id.* at 16.) Ordinarily the S1 and S2 vertebrae are fused. In the case of a transitional vertebra, the fusion is incomplete. (*Id.* at 16-17.) In claimant's case the fusion was incomplete on the left side and the S1-2 vertebrae had "a joint between the transverse process of the [S1] transitional vertebra and the sacrum." (*Id.* at 17.)

29. Despite claimant's complaints of pain into his *left* hip, Dr. Cory noted that **claimant was putting most of his weight on his left leg.** (*Id.* at 14.) In his deposition the doctor acknowledged that in light of the claimant's left-sided pain complaints he would have expected claimant to be putting most of his weight on his **right** leg. (*Id.* at 49.)

30. On January 6, 1992, the same day as he first saw Dr. Cory, claimant visited his probation officer. During their conversation the claimant indicated that he expected to receive a million dollars on account of his industrial accident:

He was discussing, at that point, a Workers' Comp settlement. He felt he was going to get a lot of money and wanted to buy a ranch and go on his own in a ranch operation. Somewhere around a million dollars is what he was talking about. And I told him I didn't think that was very realistic, but he thought it was.

(Lombard Dep. at 24.)

31. Dr. Cory referred claimant to Gary Lusin, a physical therapist, for a functional capacities examination. (Ex. 1 at 45.) The date of the actual exam is not clear. Mr. Lusin provided Dr. Cory with a written report dated February 28, 1992, but apologized "for how late this report is in getting to you." (Ex. 1 at 15.) In his report, Mr. Lusin described claimant's various complaints and stated that *claimant used a cane in his right hand, putting most of his weight on his right leg and unweighting his left leg.* (Ex. 1 at 15-19.)

32. Dr. Cory met with claimant on January 22, 1992. He did not examine claimant at that time and could not say whether claimant still had muscle spasms in his back. (Cory Dep. at 68.) He recommended injection of a local anesthetic at the site of the transitional vertebra in an attempt to determine if claimant's pain was related to his transitional vertebra. (Ex. 1 at 46.) Dr. Cory testified that a transitional vertebra can cause low-back pain due to "anomalous articulation" of the joint at that level. (Cory Dep. at 19.) The purpose of the proposed injection was to block the nerves enervating the anomalous joint. If the injection provided claimant with relief from pain, it would tend to confirm that the anomalous joint was the source of claimant's pain. (*Id.* at 20.) Claimant refused to submit to the procedure. (*Id.* at 21.)

33. On January 27, 1992, claimant went to the Bozeman Job Service looking for employment. He spoke with Larry Cloninger, a job service counselor and told him that he was healed and ready to do any type of work. (Cloninger Dep. at 10, 22 and 39.)

34. Claimant returned to Dr. Campbell on February 4, 1992. (Ex. 1 at 32.) Dr. Campbell noted: "Because of him not improving with therapy, the Pain Clinic and his normal MRI status, I am at a loss as to anything I can do for this man." (*Id.*) At his deposition Dr. Campbell was asked: "Outside of his complaints of pain, you couldn't really find anything wrong with him?" He answered: "That's correct." (Campbell Dep. at 28.) He recommended claimant be seen by Dr. James Lovitt, an orthopedic surgeon practicing in Billings. (Ex. 1 at 32.) Dr. Campbell's office thereafter made an appointment for claimant to see Dr. Teal, an orthopedic surgeon who practices with Dr. Lovitt, on March 23, 1992. Claimant did not keep the appointment.

35. Claimant was again seen by Dr. Campbell on February 14, 1992. (Ex. 1 at 31.) He told the doctor that his back hurt so bad that he had to stay in bed for three days after his last exam. (*Id.*) But other than claimant's subjective complaints of pain, Dr. Campbell could find nothing objectively wrong with claimant. (Campbell Dep. at 30.) Dr. Campbell continued to be at a "complete loss as to what to do for him [claimant]." (Ex. 1 at 29.)

36. Claimant did not seek medical care again until August 4, 1992, when he sought emergency room treatment. His medical history will be picked up later on in these findings.

37. On February 24, 1992, claimant told his probation officer that he would probably need back surgery. (Lombard Dep. at 25.)

38. On February 28, 1992, claimant again sought permission from his probation officer to move to Minnesota to seek employment at a dairy farm. (Lombard Dep. at 26.) Lombard asked him: "Are you getting Workmen's Comp?" Claimant replied that he would not give his prospective employer his correct social security number and said, "They'll never find out I'm working." (*Id.* at 26, 31.)

39. During his visits with his probation officer following his industrial accident, claimant would sometimes walk with a cane. When asked about claimant's use of a cane up to the time of the February 28, 1992 visit, claimant's probation officer testified:

This is intermittent, yeah. He would be walking with a cane, sometimes really hobbling, sometimes apparently not able to do very much without a great deal of pain. Other times he would come in walking normal. . . .

(Lombard Dep. at 28-29.) Lombard commented, "It was kind of strange that it would change from week to week." (*Id.* at 29.)

40. On March 18, 1992, claimant met with Monte Ewald (Ewald), a vocational rehabilitation counselor designated by the State Fund. (Ewald has since given up on vocational rehabilitation and is now studying to be a Lutheran minister (Ewald Dep. at 3).) During their meeting, claimant expressed skepticism about his ability to return to any sort of work. (Ewald Dep. at 10.) Ewald set up vocational testing for claimant on April 16 and May 21, 1992, but, for reasons that should become apparent from the findings of fact that follow, claimant failed to show up for either testing session. (Ewald Dep. at 15, 19.)

41. On March 25, 1992, the State Fund provided claimant with a lump sum advance in the amount of \$2,352. (Tr. II at 28; Smith Dep. Ex. 2.) The advance was based on representations by claimant's attorney that he "will probably not be able to return to his prior employment" and was to be recouped against claimant's future entitlement to permanent partial disability benefits. (Smith Dep. Ex. 3.)

42. On April 2, 1992, claimant went to the Bozeman Job Service in search of a truck driving job. (Cloninger Dep. at 24.) At that time he had a new commercial driver's license. (*Id.*)

43. During the first week of April, 1992, Boyd Trucking hired claimant as a driver. (Boyd Dep. at 5.) Bob Boyd testified by deposition that claimant denied having any physical problems and did not tell him about his October 1991 accident. (*Id.* at 6.) Claimant told Boyd that he could handle the driving, as well as tarping and untarping of loads, and putting up and taking down sideboards on the truck. (*Id.* at 7-8.)

44. On April 10, 1992, claimant underwent a Department of Transportation physical examination, which was required for his employment as a truck driver. (Smith Dep. at 33.) The examination was performed by Dr. Ed Allen of Bozeman. (Smith Dep. at 33 and Ex. 1 at 64.) In the medical history he gave Dr. Allen, claimant did not disclose his back injury. He also told Dr. Allen that he had mild diabetes which was controlled by taking insulin orally. (Smith Dep. at 35; Smith Dep. Ex. 5 at 2.) In fact, claimant's diabetes was more severe. He has taken insulin injections for many years. (Smith Dep. at 36.) Those injections apparently disqualify him from employment as a truck driver. (Boyd Dep. at 13.)

45. On April 10, 1992, claimant also met with his probation officer. He informed Lombard that he had obtained a "clean bill of health" from a DOT physician and was going to work for Bob Boyd Trucking. (Lombard Dep. at 30.) He also told Lombard that he realized that his working would result in his losing his workers' compensation benefits. (*Id.* at 30.) According to Lombard, claimant "looked like he was feeling pretty good." (*Id.* at 30.)

32.) He told Lombard that he could handle the truck driving and the loading. Claimant was not using a cane. (*Id.*)

46. Claimant began driving a semi-tractor trailer for Boyd on April 13, 1992, when he drove from Billings to Coville, Washington. (Smith Dep. Ex. 7; Boyd Dep. at 16.) Over the next three months claimant drove all over the United States. (Ex. 7 and Smith Dep. at 15.) In his deposition he agreed that he "had been basically everywhere in the 48 states." (Smith Dep. at 15.)

47. Shortly after hiring claimant, Bob Boyd received a telephone call from claimant's probation officer. (Boyd Dep. at 12.) During that call Lombard expressed concern over claimant driving out of state since that would violate the conditions of his probation. (*Id.*) Lombard also told Boyd that claimant was a diabetic. (Boyd Dep. at 13.)

48. Boyd was going to fire claimant because he believed that diabetics are barred from truck driving. (Boyd Dep. at 13.) However, claimant returned to Dr. Allen and obtained a letter from him dated May 4, 1992, which stated:

Regarding Jim L. Smith

Mr. Smith was seen for DOT physical exam in my office 4/10/92. He has been a mild diabetic for some five yrs. with never a problem of insulin reaction or shock. I believe that he should be completely safe for driving an 18-wheel truck with his current medical state. **He is not in need of insulin injections and only takes oral medication for control.**

(Smith Dep. Ex. 5 at 2; emphasis added.) Dr. Allen's statement that claimant was taking only oral insulin was based on claimant's misrepresentation to that effect. In fact, the statement was untrue.

49. Boyd was persuaded by Dr. Allen's letter and continued to employ claimant. (Boyd Dep. at 16 and Smith Dep. Ex. 7.)

50. On May 1, 1992, claimant told Lombard that he had driven one hundred and twenty-seven (127) hours during the previous week even though ICC regulations limited him to sixty (60) hours. (Lombard Dep. at 34-35.)

51. On May 21, 1992, claimant stopped by to see Monte Ewald. (Ewald Dep. at 19.) On that occasion, as well as on March 18, 1992, claimant was limping and using a cane. (Ewald Dep. at 22.)

52. Between April 13, 1992 and July 15, 1992, a period of thirteen and three tenths (13.3) weeks, claimant earned \$6,329.24 in wages from Bob Boyd Trucking. (Smith Dep. Ex. 15; Boyd Dep. at 31.) Claimant also received a \$1,150 advance which he has not repaid. (Boyd Dep. at 32.)

53. On July 17 or 18, 1992, Boyd fired claimant because he showed up a day late for loading cargo in Livingston. (Boyd Dep. at 23.) Boyd's decision to fire claimant was also influenced by claimant's inconsistent record in meeting scheduled delivery times. (*Id.* at 24.)

54. Claimant was angry over his termination. In Boyd's words, "He just -- you know, he got a little red around the gills and upset . . . ." (Boyd Dep. at 34.)

55. Not once during the entire time he drove for Bob Boyd Trucking did claimant tell Boyd that he had a bad neck or back or was in any way physically impaired. (*Id.*)

56. On July 27, 1992, Dr. Diggs performed an independent medical examination of claimant at the request of the State Fund. (Ex. 1 at 51.) During that visit, claimant complained of low back and left leg pain. (*Id.*) He also complained of chronic left back and hip pain and of difficulty walking with full weight on his left leg. (*Id.* at 52.) Claimant did not disclose that he had recently been employed as a truck driver. Dr. Diggs' record of the examination disclose that claimant told him:

He complains he is unable to walk more than 2 blocks without having to stop. He sleeps with difficulty and uses a pillow behind the left hip. He uses a back support in the car. **The last time he tried to drive out of town was a trip to Glendive in May, 1992 with severe aggravation of his symptoms. He states that he can only stand or sit in one position about 10 or 15 minutes.**

(Ex. 1 at 52, emphasis added.) As can be gleaned from the previous findings of fact, claimant's statements that he had last tried to drive out of town in May 1992, and could only sit in one position for ten (10) or fifteen (15) minutes, were blatant lies.

57. On August 3, 1992, claimant met with his probation officer. (Lombard Dep. at 40.) At that time he told Lombard that he had been fired from his job with Bob Boyd Trucking. (*Id.*) When Lombard asked claimant what had happened, claimant responded: ". . . *he told Bob Boyd to go fuck himself because he had to go see his lawyer to get Workmen's Comp and he wasn't going to work. . . .*" (*Id.* at 40-41, italics added.)

58. During his August 3, 1992 conversation with Lombard, claimant also bragged about getting workers' compensation benefits while working for Boyd:

And he [claimant] says, "Yeah, I've been getting Workmen's Comp the whole time that he was driving." *And he laughed about it and said, "They'll never catch me. I have double Social Security cards,"* and that kind of thing.

(Lombard Dep. at 41, italics added.)

59. During his visits to his probation officer between, and including, April 10, 1992 and August 3, 1992, claimant "appeared to be fine." (Lombard Dep. at 74.)

60. Claimant went to the emergency room at Bozeman Deaconess Hospital on August 4, 1992, complaining of increased pain in both legs. (Ex. 1 at 2.)

61. Claimant returned to Dr. Campbell on August 7, 1992. (Ex. 1 at 31.) The doctor's office note for that date states, in part:

James Smith is a pt I haven't seen since February of this year. His back improved for a few months but then it started getting worse again. He has pain going down *both legs*, just like he had before. . . The only quantitative tests we have done other than plain x-rays, is an MRI of his neck and back. His neck is not bothering him that much it is just mainly his back. He does say that he is having persistent right sided neck pain.

(*Id.*, italics added.) Dr. Campbell recommended further diagnostic tests, specifically a bone scan and an EMG. (*Id.*)

62. On August 9, 1992, Lombard called Paul Bogumill (Bogumill), a claims examiner for the State Fund, to report possible fraud. (Lombard Dep. at 41.) He told Bogumill that claimant had been working for a trucking firm while receiving temporary total disability benefits. (Tr. II. at 34, 43.)

63. On August 9, 1992, Bogumill also received a call from claimant's attorney urging him to accept the case on a permanent total disability basis. (Tr. II at 39, 43.) Claimant's attorney told Mr. Bogumill that "Mr. Smith would be having a very difficult time returning to work and that we're probably looking at a permanent total case here." (Tr. II at 39.)

64. Claimant underwent a bone scan on August 10, 1992. (Ex. 1 at 39.) The scan showed a spot on one rib, which could have been an old fracture. (Campbell Dep. at 38-

39. ) However, the spot had no significance. (*Id.*) The scan disclosed no other abnormalities. (*Id.*)

65. Sometime in August 1992, the claimant moved into a house on Moffitt Gulch Road in Gallatin County. (Smith Dep. at 114 and see Maus Dep. at 4.)

66. On September 4, 1992, claimant visited his probation officer. (Lombard Dep. at 44.) At that time he appeared to be "having a real hard time getting around." (*Id.*) Regarding his September 1992 meetings with claimant, Lombard observed:

[H]e appeared to be in a lot of pain. He was really hobbling with a cane, had a lot of problems getting around. He took the elevator instead of the stairs, had a hard time sitting and talking. That was in September of '92.

(*Id.*)

67. Claimant underwent an EMG study on September 10, 1992. The study was normal. (Ex. 1 at 31 and 60.)

68. Following the negative results of the bone scan and EMG study, Dr. Campbell concluded that claimant's condition was permanent and recommended an impairment rating. (Ex. 1 at 31.)

69. On September 17, 1992, claimant's attorney wrote to the State Fund and reported:

. . . Smith advised me that he attempted to return to his pre-injury occupation of truck driver by making two delivery runs for Bob Boyd Trucking, Inc., of Livingston, Montana. Unfortunately, the experience was so painful to Mr. Smith that he realized that he would never again be a truck driver, and accordingly discontinued his experiment.

(Smith Dep. Ex. 4.) This statement was at best a half-truth. Claimant drove far more than "two delivery runs." (Smith Dep. Ex. 7. ) He did not discontinue an experiment, he was fired. (Finding No. 51.)

70. By letter dated September 21, 1992, and directed to claimant's attorney, the State Fund terminated claimant's temporary total disability benefits. (Ex. 4.) Since then it has denied liability for any further benefits.

71. On November 4, 1992, claimant worked for a half-day moving gravel with a wheel barrel. (Cloninger Dep. at 15; Tunkis Dep. at 5.) According to the employer, claimant had difficulty performing the job, sweated profusely and did not complete the job. (Tunkis Dep. at 6-8.) Claimant appeared to have back pain. (*Id.*)

72. On November 17, 1992, claimant showed up at the Missoula Job Service office looking for jobs. (Cloninger Dep. at 14.)

73. Claimant filed his present petition on March 5, 1993, seeking a determination that he is permanently totally disabled or, in the alternative, permanently partially disabled.

74. On March 24, 1993, claimant pawned a gasoline engine powered lawn mower at Debo's Pawn Shop. (Gillette Dep. at 4, 6-9.) Without assistance he lifted the lawn mower out of the trunk of his car. (*Id.* at 8-9.) From personal experience, having lifted a lawn mower from the trunk of a car on a number of occasions, the Court notes that the maneuver is very stressful on the lower back.

75. Between January and April of 1993, claimant was at Debo's Pawn Shop on a number of occasions to pawn items. Bryan Gillette, a pawn shop employee who waited on claimant and who observed him lifting the lawn mower from his car, never observed claimant limping or using a cane.

76. In late March of 1993, claimant worked for one week for Gallatin Independent Grain Producers. (Madden Dep. at 4-5.) Kenneth Madden, an employee of Gallatin Independent Grain Producers, worked with claimant. (*Id.* at 4-5.) Claimant vacuumed grain from grain bins into a truck, drove the truck across the street, climbed ladders, and performed custodial tasks, including sweeping. (*Id.* at 6, 11, 13.) He did not limp, carry a cane or complain about his back. (*Id.* at 7-8.) Notwithstanding claimant's assertion when deposed that he reinjured his back while working that week (Smith Dep. at 121), he performed his job without complaint or evidence of physical disability (Madden Dep. at 7-13).

77. On April 16, 1993, following the filing of the present action, claimant went to see Dr. Cory and agreed to undergo the diagnostic anesthetic injection recommended more than a year earlier by Dr. Cory. (Cory Dep. at 21.)

78. Dr. Campbell saw claimant once more on April 21, 1993, at the request of claimant's attorney. (Campbell Dep. at 46.) Claimant reported his symptoms as being the same as when he'd last seen Dr. Campbell except that his neck was getting worse. (*Id.*)

79. While claimant was living on Moffitt Gulch Road in 1993, he ran into Harold Lesh (Lesh), an acquaintance. Lesh testified at trial and was a credible witness.

80. Claimant told Lesh that he had a workers' compensation claim going. (Tr. II at 6.) Claimant showed Lesh a calf that he had stolen and told him that he had to carry the calf up a hill, over a fence and put it into his truck. (*Id.* at 10.) Claimant also pointed out a large television he said he had stolen. (*Id.* at 11.) Lesh asked claimant how he managed to carry the television if his back was hurt, and claimant told him that it was not a problem for him. (*Id.* at 11-12.) Claimant told him that "he was doing burglaries because it was under the table and the Workers' Comp couldn't find out like they did on Bob Boyd Trucking." (*Id.* at 16.)

81. When Lesh first saw claimant in Bozeman, claimant was limping, but after claimant took Lesh to his house the limp disappeared. (Tr. II at 18.) Claimant told Lesh that his workers' compensation claim was a "scam." (*Id.* at 23.)

82. On May 26, 1993, Gallatin County Deputy Sheriff Rob Christi (Christi) executed a search warrant at claimant's home on Moffitt Gulch Road. (Christi Dep. at 4-5, 11.) At that time Christi observed claimant over a two hour period. Claimant walked without either a cane or limp, or any evident pain. (*Id.* at 15.) After executing the search warrant and talking to claimant, Christi arrested the claimant. (*Id.* at 5.)

83. On May 27, 1993, Christi saw claimant at the Gallatin County Detention Center and he still did not observe claimant manifesting any physical problems. (Christi Dep. at 16.) In later visits to the Gallatin County Detention Center, where claimant was confined after being arrested, Christi noticed claimant walking with an obvious limp and seemingly in pain. (Christi Dep. at 17.)

84. Larry Cloninger, a Bozeman Job Service employee who saw claimant on numerous occasions after the October 24, 1991 accident, never saw claimant walk with a cane or with a limp. (Cloninger Dep. at 38.)

85. Sandy Maus (Maus) was claimant's neighbor when he lived on Moffitt Gulch Road. (Maus Dep. at 4.) Claimant lived on Moffitt Gulch Road from August 1992 to May 1993. During that time Maus frequently saw claimant driving back and forth to his house. She saw claimant two or three times a month, usually at night or on weekends, getting out of his car (Maus Dep. at 5) but never saw him limp or use a cane (*Id.* at 7).

86. In attempting to excuse his failure to notify the State Fund of his employment with Bob Boyd Trucking, claimant told Lombard that his attorney told him that it was okay for him to work for a test period and collect workers' compensation benefits. (Lombard Dep. at 43.) Later on, claimant changed his excuse and told Lombard that it was his doctor that told him it was okay. (*Id.*) At his deposition claimant said that a neighbor told him that it was okay to work and collect benefits (Smith Dep. at 23) but the neighbor denied it (Cline Dep. at 9).

87. Claimant attempted to minimize the significance of his working for Bob Boyd Trucking by testifying that his wife was actually doing most of the driving. (Smith Dep. at 17 and 77.) However, claimant did not have a release for his wife to be in the truck until July 6, 1992. (*Id.* at 78.) She did not have a commercial driver's license (*Id.* at 81) and could not back up a truck. (*Id.* at 81). In trying to explain away the fact that he had to drive through truck checkpoints, claimant testified:

- Q. You were in the truck the whole time?  
A. Yes. I had to be to go through scales.  
Q. So what did you do when you would get to a scale, would she get out of the truck? I mean, would you stop before you got to the scale and trade seats?  
A. *We would just switch while we were driving down the road.*  
Q. That sounds safe.  
A. There's plenty of room in there. All you do is slide the seat back. I could get all the way into the sleeper.  
Q. So every time you got close to the scale, you guys would switch seats?  
A. Yes, as soon as we found out whether it was open or closed.

(*Id.* at 81-82, italics added.) His explanation on its face is incredible.

88. Claimant's attempt to make the Court believe that his wife was doing most of the driving is further undermined by the traffic citations he received during the time he was employed by Bob Boyd Trucking:

- Q. You did, though, [get a ticket] didn't you?  
A. Yes.  
Q. Driving.  
A. Just on the accidents.  
Q. Did you get a ticket driving for Boyd Trucking?  
A. Yes.  
Q. How many?  
A. Just one.  
Q. Where?  
A. In Ohio.

\* \* \*

- Q. What was the ticket for?  
A. For an improper lane change.  
Q. I also have a ticket here that says you were going 68 miles an hour in a 55-mile-an-hour zone, and that was written in Montana; is that accurate?

A. Yes.

(Smith Dep. at 83.)

#### Impairment Ratings

89. On August 11, 1992, Dr. Diggs gave claimant a five (5%) percent impairment rating of the whole person because of his minor degenerative changes and chronic pain complaints. (Ex. 1 at 47 and 49.) Dr. Diggs concluded that claimant had reached maximum medical improvement, and stated that "Mr. Smith is encouraged to return to work at the type of jobs he has had in the past, including work as a mechanic or a truck driver . . . ." (*Id.* at 49.)

90. On October 6, 1992, Dr. Campbell assigned claimant a twenty (20%) percent impairment rating. (Ex. 1 at 25.) He apportioned twelve (12%) percent of that rating to claimant's cervical spine and the remainder to the lumbar area. (*Id.*) However, he was unable to relate the mild cervical herniations to the industrial accident and conceded that claimant's limitation in the range of movement of his neck was subjective. (Campbell Dep. at 40-44.) The impairment rating for the lumbar spine was based on claimant's transitional vertebra, which according to Dr. Campbell is a congenital defect, and range-of-motion limitations, which he also conceded were based on claimant's subjective performance in testing. (Ex. 1 at 25; Campbell Dep. at 43, 49.) Dr. Campbell concluded that claimant "is not able to perform any heavy work. I question that he will be able to perform a regular job at all." (Ex. 1 at 26.)

91. Dr. Campbell was critical of Dr. Diggs' impairment rating and testified that Dr. Diggs' evaluation did not conform to standard medical practice. (Campbell Dep. at 51-52.) Dr. Diggs did not testify and his rating is disregarded.

#### Claimant's Medical Condition

92. Based on their treatment of claimant and upon what claimant reported to them, both Dr. Campbell and Dr. Cory related claimant's low-back condition to his industrial injury.

93. Dr. Campbell could not explain claimant's pain on any objective basis. (Campbell Dep. at 7.) Based on claimant's subjective complaints, he opined that claimant has fibromyositis. (*Id.* at 7-9.) Dr. Campbell characterized fibromyositis as a catch-all diagnosis for when a doctor does not "know what the hell is going on." (Campbell Dep. at 12.) Based on claimant's subjective complaints, it was Dr. Campbell's opinion that claimant cannot return to work as a long-haul truck driver. However, Dr. Campbell said that if claimant's subjective complaints are disregarded, then there is no objective reason claimant cannot go back to long-haul truck driving. (Campbell Dep. at 34.)

94. Dr. Cory disagreed with Dr. Campbell's diagnosis. (Cory Dep. at 94.) He challenged the fibromyositis diagnosis based on his opinion that the diagnosis must be based on a finding of eleven out of eighteen pain trigger points. (*Id.* at 56.) Dr. Cory found no trigger points. (*Id.*)

95. In relating claimant's current low-back pain to his industrial injury (Cory Dep. at 19 and Ex. 1 at 45), Dr. Cory relied in large part to history and claimant's complaints. (*Id.* at 47.) He opined that the source of claimant's pain is his transitional vertebra and that the pain was triggered by the accident. (*Id.* at 28 and 39.)

96. Dr. Campbell disagreed with Dr. Cory's assessment. He noted that claimant's transitional vertebra was a congenital defect and that medical opinion that an injury can irritate the defect and make it symptomatic is medically "controversial." (Campbell Dep. at 49-50.)

97. Dr. Cory conceded that claimant's transitional vertebra is a congenital condition that does not necessarily produce pain. (Cory Dep. at 64-65.) His opinion attributing claimant's low-back pain to an aggravation of the vertebra was based primarily upon the results of an anesthetic block performed in April of 1993. Claimant was asked if he experienced a subsidence of his pain and he answered yes. A series of physical tests were then performed to determine whether claimant benefited from the anesthetic block. (Cory Dep. at 27-30.) The tests were administered by a physical therapist and called for claimant to perform various tasks. (*Id.* at 30- 35.) Based on a comparison of how claimant had performed the various tasks in 1992 with how he performed the same tasks after the block, Dr. Cory concluded that the block made a difference. (*Id.*) For example, he said that "[c]omparing his 1992 videotape to the videotape from April 30th of 1993, he was clearly more comfortable arising from a seated position, did it much more smoothly and in a more coordinated fashion." (*Id.* at 30.) Claimant's performance on both occasions, however, was dependent upon claimant's subjective effort. The only objective test performed on claimant was one involving a "force plate" which measured claimant's center of gravity while standing on one foot. (Cory Dep. at 31-32.) Standing on his left leg -- which is the side of his transitional vertebra -- there was no significant change in claimant's ability to balance pre- and post-block. (*Id.* at 31.) Only while standing on his right leg was there a change of potential significance. (*Id.* at 34.)

98. Neither Dr. Campbell nor Dr. Cory placed restrictions on claimant on account of his cervical spine or neck pain. (Cory Dep. at 47-48; Campbell at 78.)

99. Ultimately, both Dr. Campbell's and Dr. Cory's opinions and restrictions were based on claimant's subjective reports of pain and upon claimant's voluntary responses. They were not based on any objective findings. Indeed, there is no documented finding of muscle spasm after January 1992. (Campbell Dep. at 89; Cory Dep. at 14.)

100. During his January 6, 1992 examination of claimant, Dr. Cory administered up to three *Waddell* tests. (Cory Dep. at 56-58; and Dep. Ex. 3.) These tests consist of physical maneuvers to "assess when a patient may be misrepresenting their situation." (Cory Dep. at 56.) There are five tests for lumbar pain. Dr. Cory adduced one "positive" test (*Id.* at 56-58), indicating that claimant's pain was not as he claimed. However, he testified that the tests are "significant" only if three of the five tests are positive. (*Id.* at 57.) But he did not perform all five tests; at best he performed only three because of his belief that if only one of three tests is positive then it is unlikely that three of five would be positive. (*Id.* at 92.)

101. In his note of his August 11, 1992 examination of claimant, Dr. Diggs reported that claimant had "strongly positive Waddell signs." (Ex. 1 at 48.)

#### Credibility

102. All but two of the witnesses in this case testified by deposition. Ordinarily, credibility determinations are heavily dependent on the fact finder's personal observation of witnesses. But credibility may also be assessed by the content of the testimony and the particular manner of witness' responses. Possible biases of witnesses must also be considered. Having reviewed all the evidence in this case, the Court has reached a firm conviction that the claimant has lied about his back condition in an attempt to obtain workers' compensation benefits. He has lied to his doctors, to his attorney, and to the Court. The foregoing findings, and a reading of claimant's deposition, should support this conclusion without further discussion.

#### Resolution

103. Claimant was bruised and cut but was not seriously injured when his truck went off the road and overturned on October 24, 1991.

104. Claimant recovered from the accident.

105. Since January 1991, the claimant has exaggerated and falsified his pain and condition in an attempt to secure workers' compensation benefits.

106. Physician testimony supporting claimant's request for permanent total disability benefits was predicated almost entirely on claimant's subjective complaints. Those complaints were false.

107. Claimant suffered no permanent effect from his industrial injury and is not permanently totally or permanently partially disabled.

#### CONCLUSIONS OF LAW

1. The law in effect at the time of the injury governs the claimant's entitlement to benefits. ***Buckman v. Montana Deaconess Hospital***, 224 Mont. 318, 730 P.2d 380 (1986.) Thus, the 1991 version of the Workers' Compensation Act governs claimant's entitlement to benefits.

2. In seeking permanent total or permanent partial disability benefits, as well as rehabilitation benefits, claimant must prove by a preponderance of the evidence that he is entitled to the requested benefits. ***Ricks v. Teslow Consolidated***, 162 Mont. 469, 483-484, 512 P.2d 1304 (1973); ***Dumont v. Wicken Bros. Construction Co.***, 183 Mont. 190, 201, 598 P.2d 1099 (1979.) Claimant did not meet his burden.

3. I find it unnecessary to engage in any citation to or discussion of the law applicable to benefits. I have found as fact that claimant is not disabled on account of his October 24, 1991 industrial accident and that his pursuit of benefits in this case is part of a fraudulent scheme.

#### JUDGMENT

1. Claimant is not entitled to permanent total, permanent partial or rehabilitation benefits.

2. Claimant is not entitled to a penalty, attorney's fees or costs.

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

4. Any party to this dispute may have twenty (20) days in which to request a rehearing from these Findings of Fact, Conclusions of Law and Judgment.

Dated in Helena, Montana, this 3rd day of May, 1995.

(SEAL)

/S/ Mike McCarter  
JUDGE

c: Mr. Stephen C. Pohl  
Mr. Oliver H. Goe  
Mr. Chris Ragar