

MY APPEAL TO THE STATE COURT - WORKERS COMPENSATION BOARD

IN THE COURT OF APPEALS

OF

THE STATE OF OREGON

EDWARD M. JOHNSTON)

) Case No. _____

plaintiff

) Appeal of Workers Compensation Board

) Decision in re:

) Case No.: 05-08315

) Claim No. C6404749910

vs.

) ORS 656.298 Right to Appeal

) 183.480; 183.284, 183.490

WORKERS COMPENSATION)and OAR

OF THE STATE OF OREGON ,)

436-0170(1) and (6) and

DEPARTMENT OF HUMAN SERVICES) 436-001-0225

And

)and 438-012-0037 through 438-012-0061

JOHN SCHILTZ, DIRECTOR of the)

Workers Compensation Board)

defendants

)

I, Edward M. Johnston, acting for myself, hereby file

this Appeal of the Workers Compensation Board decision in my case against the above named defendants.

Following is my Statement of the Facts of the Appeal. All documents and papers mentioned below are in the record.

The defendant agency is an agency of the state of Oregon and is present within Oregon and subject to the jurisdiction of this court and the defendant individual is the director of that agency and is present within Oregon and subject to the jurisdiction of this court. ORS 656.298

ORS 30.275 has been met by extensive, ongoing, and detailed filings, letters and other communications with WCB and actual notice thereby more than given under 30.275(6).

In addition, Plaintiff requests the court to act under the following:

ORS 183.480(1), because this is an appeal from a final order, issued by the Workers Compensation Board when it reviewed the decision and order of ALJ Jenny Ogawa after several years of exhaustive "and exhausting" contesting of a series of maneuvers by Liberty NW insurer and orders by the Workers Compensation Board.

183.482(5) I am filing this, in what must be a contested case, as I and the Workers Compensation Division (and Liberty Northwest, the insurer) have been in contest over this, with a long string of paper work to prove it. I am an "adversely affected or aggrieved" party here.

183.482(9) I request under this section that the court reverse the final order in this case, issued by the Workers Compensation Board upholding the decision of ALJ Jenny Ogawa, and ,

183.490, I request the court to order the WCB board to provide me the remedies I request, or other as the court may deem just. I specifically request the court do not remand this back "again" to those who have already treated me unfairly and I believe illegally. If this keeps going on, I will die before I receive justice, or fair compensation.

STATEMENT OF FACTS

1. I was first injured on 11/4/89 at the Pip-Tide restaurant, (now under a different name) address 836 SW Bay Blvd , Newport . I was hit with a pipe on and around the back of the neck. The injury is referenced in the Notice of Claim Acceptance dated Dec. 13, 1989.
2. The injury was initially described as "acute strain" and "non disabling" by the insurer, Liberty Northwest. See the Notice of Claim Acceptance for 11/4/89 injury issued by Liberty Northwest Insurance, dated Dec. 13, 1989 ,
3. I was not then medically stationary. See Supplemental Med Report 828 by Dr. Gilbert Lee describing me as not medically stationary, dated 12/26/89 .
4. The pain from the injury had grown wider over the next few months. See Note by Dr. Lee stating "the pain is now in the back of his head, neck and upper back." It was dated 4/12/90
5. I got into another fight at the Pip Tide, 4/27/90 , mentioned in the Physical Therapy Authorization" by Dr. Lee dated 5/8/90 . There was no significant medical consequence in the immediate or near-term aftermath.
6. Liberty accepted the 11/4/89 injury as disabling. See Insurer's Report dated 5-31-1990 .
7. Dr. Gilbert would not release me for work, and could not give a date when I might be medically stationary. See Supplemental Med Report 828 by Dr. Gilbert Lee dtd 6/6/90 .
8. I was found to have suffered a closed head injury, moderate cervical strain, upper cervical area and to be unable to pursue employment as a doorman/bouncer any more. The chief cause of my injuries and pain were the Nov. 4, 1989 injury. My condition was still not stable. There was a concern at this point for a "neurological base" to some of my pains. Medical Arbiters Report, by Drs. Thad Stanford, Orthopedic Surgeon and Berle Barth, Neurologist, BBV Medical Report, dtd July 9, 1990 .

9. I was allowed to go to work, but under restrictions (only sedentary work and light work, lifting 20 pounds maximum, carrying ten) and the restrictions were judged permanent. See Work Release by Dr. Bernstein dtd 9/24/90

10. My main physician at the time, Dr. Lee, concurred with BBV report, see note from him, 7/23/90

11. I was found to have a very small central disc herniation at the C4-5 level; left paracentral disc herniation at the C5-6 level and a narrow AP diameter of the spinal canal. Portland Magnetic Imaging Lab, Dr. John English, MRI Interpretation: Dtd 11/28/90

12. Bernstein sent me to Dr. John Serbu, who found me "neurologically negative," denied any herniated disk, although admitting there is a "slight central bulge." He concluded "I believe this man's best treatment would be to return back to heavy work which he did previously." Letter of Dr. John Serbu dated 1/7/91 .

13. Dr. Bernstein disagreed with conclusions regarding work, saying I could do just "lighter, sedentary physical work" less than 20 pounds on a regular basis. Ltr from Dr. Bernstein 1/17/91 .

14. I was found to have a herniated disc at C5-6, on the left, capable of modified, but not regular work, and not medically stationary. See "Impressions" section of letter of Western Medical Consultants, Dr Thomas Gritzka, Orthopedist, and R. Glenn Snodgrass, neurologist, dtd 1/17/91.

15. Liberty NW sought to deny or diminish my injuries, See letter to Dr. Bernstein dtd 1/25/91 , signed by Liberty Claims Examiner Hepp,

16. Dr. Bernstein repeated his agreement with Western Medical findings, and his disagreeing with Serbu re: my ability to do regular work. Letter Feb. 4, 1991 by Dr. Bernstein.

17. Bernstein concluded in a somewhat qualified and uncertain manner that I was medically stationary but needed physical therapy 3x per week.

Letter from Dr. Bernstein dtd 2/11/91 .

18. Dr. Bernstein was indicated as having been worn down by treatment by Liberty NW. Text of one document states "On 2/11/91, Dr. Bernstein was apparently worn down by Liberty Northwest's harassment and responded to a phone call from the claims examiner by saying: "I believe that he is currently medically stationary", but that he also believed that Johnston will need three times a week physical therapy for the next three months in order to maintain that. The text says the "coerced and qualified statement does not even come close to a medically stationary finding, despite the use of the "magic" words." Document with text "Request for Reconsideration, Page 2" at the top, the origin of which is unclear, but probably from an attorney for me. The date is not given. It is attached to a Request for Reconsideration sheet. See its 3rd paragraph.

19. Workers Compensation in a Determination Order stated that "The Department orders you entitled to compensation for temporary disability, less time worked, \$3,200." The insurer is ordered to pay you \$3,200. Determination Order dated April 9, 1991 .

20. Dr. Bernstein found I had not just cervical strain as alleged by Liberty but also a disk herniation in the cervical spine. Letter of Dr. Bernstein 4/10/91 .

21. I was found to be in severe pain and need of pain treatment program. See OREGON PAIN CENTER (OPC) initial review of my case and recommendations in OPC case assessment document dated May 23, 1991 .

22. OPC found that my permanent disability award was appropriate, and I will probably be limited to work in the medium category. Its Findings included "Mild herniated disc C5-6 left by MRI. OPC medical review dated May 23-24.

23. OPC found me "limited to work in the medium category." Oregon Pain Center medical review dated May 29, 1991 .

24. Workers Compensation Board reduced disability to none. See ORDER ON RECONSIDERATION. WCB order is dated May 7, 1992 .

25. I was found to have an "Unscheduled permanent partial disability of 25.6 degrees for 8 percent equal to \$2,500 for neck." Time loss compensation paid is given as \$7,958; medical compensation paid \$22,139. 10/25/91 Notice of Closure, Workers Comp. Div.

26. Workers Comp board gave me 15% for unscheduled neck and left shoulder permanent partial disability and allocated monies. The attorney got a share; Liberty got an offset; all other relief I had requested was denied. Misbehavior by Workers Compensation Div. was noted in this document by the Board finding itself, where it states "The award was reduced to zero by Order on Reconsideration dated May 7, 1992 on a finding of no impairment by Dr. Stanford the appointed medical arbiter. "Dr. Stanford, should not have been appointed medical arbiter since he was previously involved with this case as an agent of a party" That party was the insurance company, for which Dr. Stanford acted as consultant. (page 3) See Referee D. W. Daughtry OPINION AND ORDER: dated August 26, 1992 . (Underline added.)

27. ORDER ON REVIEW by W/C Board. WC Board agreed with my doctors finding that "claimant does have permanent impairment."

28. Board found it would "rely on the impairment values concurred in by claimants attending physician (Dr. Bernstein) as found in Dr. Holmes Discharge Status Report." This Discharge report is not in the record but this reference to it is, see report dated June 18, 1993 , David Lipton and Donald Hooton.

29. I went to the Pacific Communities Hospital Emergency Room (PCHER) several times thereafter for pain and related symptoms. See PCH E/R note: cervical disk disease, Feb 5, (1994, sensitive at C4, 5 and 6); also PCH ER note: black-out while driving, and pain and tingling 11/19/94; PCH E/R note: speaks of history of closed head injury, 5/16/95; PCH E/R note "Patient has a pattern of left upper extremity weakness that does not clearly correspond to any discreet myotomal level. It seemingly would involve at least C5, C6 and C7." 6/9/95

30. Brain image found brain normal. PCH Diagnostic Imaging Report Brain MRI 2/22/96 .

31. I was found to have some degenerative change at C4-5 and C5-6 consisting primarily of intervertebral disc narrowing and anterior bulging. There is some suggestion of spasm. PCH Diagnostic Imaging Report 9/22/97 .

32. Dr. Hacker found I likely have a painful cervical spondylosis disorder (emphasis added) and recommended a repeat MRI scan to determine whether there have been late changes with significant root or spinal cord entrapment. Robert Hacker, Neurosurgeon ltr to Dr Cephus Allin. Dated 11/12/98 (Underline added.)

33. Evidence was lost in this case, as noted in Medical report, which also found continued degeneration in C4-5 and C5-6, stating A review of outside films confirms degenerative changes, most pronounced at the C4-5 and C5-6 level. There is nothing to suggest an obvious deformity or subluxation. The patient has an MRI report that is several years old, documenting spondylotic change at C4-5 and C5-6. These studies apparently have been lost. It also stated that symptoms potentially related to spinal cord and nerve root entrapment, without clear cut obvious neurological deficit. Rule out spondylotic radiculopathy or myelopathy. Document was Neurosurgical History and Physical, by Dr. Hacker, dtd Nov. 12, 1997

34. I was found to have 1) Abnormality at C5-6 on the left that was larger than expected from plain-film findings and probably a combination of cervical spondylosis, foraminal narrowing, and disc herniation. 2) Smaller midline left abnormality at C4-5, probably representing cervical spondylosis rather than disc herniation. MR Imaging Associates, 12/12/97 ltr from Dr Hacker, unsigned, from RCHjh

35. I had an MRI on 12/22/97 which began process leading to my First Operation. It stated The MRI scan is reviewed, documenting a large osteophytic deformity with perhaps associated disc protrusion at the left C5-6 level compressing the nerve root and spinal cord on the left side. At the C4-5 level there is a small lesion which appears to be an asymptomatic cervical disc protrusion. Symptomatic cervical spondylosis with disc herniation, C4-5 left. The recommendation was to Proceed with anterior cervical microdiscectomy with fusion, allograft and internal

fixation.â€œMRI Brief note 12/22/97

36. I filed a Notice of Claim for AGGRAVATION of my conditions, signed by me 1/16/98 , and signed by Dr Hacker 1-11-98 .

37. Dr. Vincent Allin was, or felt he was, harassed by Liberty NW. See letter note on Internal Medicine Associates letterhead, obviously a cover letter, dtd Feb 9, 1998 . Only text is: â€œMs. Jones, 384 pages. Go to hell. Cephus Daniel Vincent Allin M.D.â€œThis is evidence of further harassment of doctors. (Pamela Jones is the recipient, at Liberty NW.) (Emphasis added.)

38. Dr. Hacker also feels that communications from insurer are unhelpful. Hacker replies to a request for information from Liberty NW by numbered paragraphs, presumably reflecting the questions Liberty had asked. 1. includes: â€œmy examination is different now in the sense that his MRI scan documents a large deformity with disc protrusion at the left C5-6 level with compression of the nerve root and spinal cord. Also, the patient has evidence of diminished biceps strength on his left side.â€œ2. â€œYes. Be so advised.â€œ3. â€œIs this a question?â€œ4. To characterize the nature of this accident as 'neck strain,' in my opinion, is probably incorrect. On the other hand, I expect that cervical spine injury with the episode described has resulted in an osteophyte formation and disc hernia. ... my MRI findings, as well as Dr. Holmes' report are continued within your medical record file.â€œ6. â€œThe patient's present condition is due to a cervical disc herniation, as mentioned above. It is not related to a cervical strain. Cervical spondylosis and foraminal narrowing may indeed be superimposed upon this condition.â€œSee ltr to Liberty , dated Feb 21, 1998 from Dr Hacker. The letter from Liberty it responds to is not in the record but is evidently dated 2/6/98 . (Emphasis added.)

39. Further exam by MRI confirms certain specific conditions. â€œOutside films confirm degenerative changes at C4-5 and C5-6. My MRI was found to show a â€œlarge osteophytic deformity with disk protrusion at the left C5-6 level compressing the nerve root and spinal cord. At the C4-5 level there is a small lesion which appears to be asymptomatic.â€œPlan: proceed with (operation). Physician Robert

Hacker: Document entitled "Current Complaint," dated 03/03/98, McKenzie-Willamette Hospital letterhead.

40. FIRST OPERATION: 03/03/98, it was at McKenzie-Willamette Hospital, by Physician Robert Hacker. The document entitled "Name of Operation," dated 03/03/98 discussed reasons for the operation. It confirmed diagnosis of "cervical spondylosis with cervical disk hernia." And it gave a "Post-operative diagnosis: cervical disk hernia, C5-6, left. Findings: There was osteophyte formation at the C5-6 level, but this was broad based without focal foraminal encroachment. At the C5-6 level, there was disruption of the annulus to the left of the midline with disc material extruding into the epidural space. This soft material resulted in compression of the origin of the C6 nerve root."

41. The operation helped for a while: See Dr. Hacker note, 3/31/98, when I told doctor the "pressure is gone,"

42. But a month later, I was hurting again. See 4/19/98 Pacific Communities Hospital E/R Note: neck pain.

43. I received a rejection of my request for recognition of aggravation of conditions, from Liberty. LTR from Liberty to me: reject claim for aggravation April 30, 1998.

44. Liberty denied me medical benefits. See April 30, Insurer's Report states "Liberty NW is denying medical benefits only."

45. Doctor Hacker, my neurosurgeon, confirmed in a note dated 7/27/98, "the fact that the patient found the onset of his symptoms with the injury described would point to the injury as being the major contributing cause of his disk herniation and need for surgical treatment." (Emphasis added.)

46. Liberty sought to still deny medical coverage for me, See, OWN MOTION ORDER REFERRING FOR CONSOLIDATED HEARING (Liberty still referring to "acute neck strain"), dated July 7, 1998. Liberty had denied compensation for "current cervical disc herniation C5-6 left condition." (and) opposes reopening on the following grounds: (1) the insurer is not responsible for claimants current

condition, (2) surgery of hospitalization is not reasonable and necessary for the compensable injury; and (3) claimant was not in the work force at the time of disability.â€œ

47. A letter from my then attorney Strooband to Hacker, asked Hacker to confirm views of Drs. Gritzka and Snodgrass that the herniated disk at C5-6 was due to the 11/4/89 injury. Hacker agreed, and mentioned the MRI of 11/28/90 .

48. Workers compensation finally agreed with me and the weight of medical review. Answer to question of, is the neck injury compensable? IT is therefore ordered that the insurer's denial, dated April 30, 1998 , is set aside. The insurer shall accept and process claimant's claim...â€œOPINION AND ORDER; Dec 21, 1998 .

49. Liberty accepted the C-56 condition, but still not C4-5. See NOTICE OF ACCEPTANCE from Liberty dtd 12/29/98 â€œC5-6 left sided disk protrusionâ€œ is an accepted condition. Classified as Disabling.

50. Liberty did not appeal the findings. See OWN MOTION ORDER: Feb 10, 1999 . authorizing reopening of my 1989 injury claim to provide temporary disability compensation beginning March 8, 1998 ...â€œ

51. Board closed Own Motion Claim. See NOTICE OF CLOSURE BOARDS OWN MOTION CLAIM. Dtd 3/11/99 , awarded me time loss compensation \$8,473, for period 3/8/98 through 2/3/99 . Nothing, however, was stated regarding payments in the future for what would likely be a permanent disability.

52. Despite the surgery, my neck continued to be a serious problem. See Dr Sayre medical visit note: 5/24/99 â€œsomething pop in neck; compression feeling.â€œDiagnosis strain & spasm.

53. My neck situation at the time was worse than that. See May, 1999 Diagnostic Imaging Rpt: â€œsome narrowing of the C4-5 and C6-7 discs, potentially secondary to the decreased mobility at C5-6â€œFusion (operation) seems stable.

54. I went to E/R again on May 30, 1999 , with pain in neck: E/R note. (I had been rear ended in

an accident, but it seemed to have little lasting effect.) See Diagnostic Imaging Rpt 7/25/99 "no change from prior exam.

55. However, by October there were further degenerative changes. See 10/11/99 Hacker note; some degenerative change at C4-5 and C6-7.

56. I remained in frequent pain, but as yet it had not worsened into neurological problems. See 11/9/99, note by Dr Fraser, "neck pain, chronic. No evidence of any neurologic component at this point."

57. SECOND INJURY. On July 28, 2001 I slipped and fell on wet floor Saturday night while working at GEORGIES restaurant. See Initial Notice of Acceptance, from Liberty: 11/6/2001. for acute cervical and lumbar strains. Non-disabling. And letter to OSHA and OSHA report. Medical report thereafter found I had severe low back pain and some tingling in knees | reflexes at knees are unobtainable | It urged that I don't lift more than 15 pounds.

58. I received a medical exam on 10/10/2001 by Health Solutions Independent Med Exam. by Richard Arbeene, He adhered to the Liberty theory I had cervical strain. He wrote he "did not identify any work related condition objectively limiting | his regular work. | I would expect the cervical strains to resolve within a period of six to eight weeks. .. No permanent impairment as a result of the 07/2/01 reported work injury." He also noted that he performed the medical exam without having taken or seen any X-Ray or MRI images. ///

59. My condition continued to get worse. There was now identifiable compression on my spinal chord. See Diagnostic Imaging Report 10/23/01 Dr Gary Theuson. "Broad based disc protrusion C4-5 which is slightly biased to the left and compresses the cord along its ventral surface."

60. Arbeene stuck with the "strain" theory. See 10/30/2001 Health Solutions Independent Med Exam. By Richard Arbeene, "cervical and lumbar strains."

61. Liberty went with the Arbeene

diagnosis, despite the fact of past surgery, the lack of basis for Arbene's report, and the weight of contrary medical opinion. See Initial Notice of Acceptance, from Liberty : 11/6/2001 . for acute cervical and lumbar strains. Non-disabling.

62. Dr. Theuson disagreed with that. See his replies on the letter to Theuson from Liberty . Letter from Liberty is dated Oct 10, 2001 . Date of Theuson response not certain. Theuson checked box: I do not concur, and wrote. "I agree with findings but also agree that final determination [text unclear] on comparison with prior condition. I have referred patient to original surgeon who did his cervical fusion for re eval with current MRx."

63. I had another MRI which made it clear my neck was in fact getting worse. See 11/26/01 Hacker ltr: "Current Complaint." A review of his MRI scan confirms spinal cord compression and a disc herniation at the C4-5 level | Cervical myelopathy due to disc hernia, C4-5

64. Liberty then denied anything but strain. See faxed memo from Liberty to Liberty. "We only accepted an acute cervical and lumbar strain. These are not surgical conditions and therefore we are not authorizing the surgery for a cervical disc." 12/7/2001

65. I had another MRI. It showed that things were getting worse now in my spine; that is, the deterioration was spreading. See 2/27/02 MRI of lumbar spine, notes by Dr. Greg Bear. "There is mild disc space narrowing from L3-4 through L5-S1; these discs also demonstrate decreased signal intensity consistent with desiccation. There is somewhat prominent lumbosacral lordosis. L3-4 mild broad-based posterior disc bulge, resulting in mild stenosis of the spinal canal. There is mild encroachment on both neural foramina, but no evident impingement upon the existing nerve roots. L4-5. there is a broad-based posterior disc bulge/osteocyte, resulting in minimal stenosis of the spinal canal. The disc bulge is slightly more pronounced posterolaterally to the right. There are mild hypertrophic changes in the facets. These factors combine to result in encroachment upon the right neural foramen. There is mild partial effacement of the perineural fat planes associated with the existing

portion of the right L4 nerve root.

66. That led to my SECOND OPERATION See the 3/4/2002 STAT REPORT: NAME OF OPERATION: It described this operation: Anterior cervical microdiscectomy with canal decompression with instrumented interbody fusion with allograft C4-5, with repeat exposure and explanation of previous fixation plates C5-6. PREOPERATIVE DIAGNOSIS: transition segment disease with cervical spondylotic myelopathy with disk hernia C4-5. POSTOPERATIVE DISAGNOSIS (same). FINDINGS: "Spinal cord compression was obvious at the C4-5 level due to disc protrusion, as well as bony osteophyte formation. At the conclusion the canal was thoroughly decompressed with satisfactorily positioned 8 mm allograft in place at C4-5 interspace. The previous Orion plate had been removed at C4-5 and a new plate positioned at C4-5." It was signed by Dr. Robert Hacker.

67. The disc hernia at C4-5 was confirmed in the 3/5/2002 DISCHARGE REPORT. This was a condition that Liberty refused to accept and that Workers Compensation did not try to obtain or order compensation for, for me.

68. Liberty wrote my doctor seeking replies to questions. See the 3/18/2002 Ltr from Case Manager Theresa Tracy, Liberty to Dr. Theuson. It asked if Theuson agreed with certain propositions. Thus: Liberty asked, is the acute cervical/lumbar strain resolved? Theuson replied: "As of 10/23/01 MRI my Rx changed from strain to herniated disc C4-5 level" Liberty also asked: "Do you agree that with regards to his accepted strain only he could do his regular work?" Theuson: "He worked until the time of his surgery and cannot work now until recovered." "Do you agree that with regards to his strains he did not suffer any permanent impairment?" Theuson checked NO box.

69. Liberty next declined to link the C4-5 injury to the accident. Workers Compensation made no comment. See letter of 5/2/2002 from Liberty to me: "we find that your work injury/activity is not the major cause of your C4-5 cervical disc herniation."

70. The Occupational Safety and Health Administration of Oregon found that my slip and fall had occurred at a place with a hazardous condition at

the Georgie's restaurant See 5/2/2002 OSHA Citation and Notification of Penalty. "The floor area between the dishwashing department and the grill work area, in the kitchen, becomes slick when water from the dishwashing department is tracked or spilled and grease from the grill area is tracked on to the wet floor."

71. Liberty still concluded that both of my injuries were nondisabling. See 5/8/2002 Insurer's Report. Status of claim: partially denied; nondisabling; injury; original injury; claim was previously deferred/nondisabling; notice of partial denial.

72. I still continued to get worse: the area of injury was spreading, to C6-7 and to C3. See 8/16/02 Diagnostic Imaging Rpt, Samaritan Pacific Communities Hospital, 4 views. "There (are) inferior plate screws inset at the inferior aspect of the C5-6 disk space, and the disk space appears to be ossified. There are moderate degenerative changes at C6-7. The immediate prevertebral soft tissues are abnormally thickened at the C3 level."

73. I continued to hurt and have other symptoms. See Hacker note 9/23/02 that patient "continues to have symptoms consistent with myelopathy, with electric shocks which will radiate into his arms and won into his legs. He tells me these symptoms do not seem to have changed much."

74. It got worse. C3-4 level reveals mild disk bulging with no focal or discrete herniation and no significant canal or foraminal narrowing. C4-5 and C5-6 levels reveal interbody fusions. No significant canal or foraminal stenosis. Identified. There appears to be a mild disc bulge at C6-7 with no significant canal or foraminal narrowing. Mild left foraminal narrowing is noted. Dr. Larry Wampler 10/09/2002 MRI cervical spine report.

75. Spondylosis continued to be identified and "something new - displacement of my cervical chord was found, along with other problems, by a doctor who, in other regards, I disagreed with. There is vertebral body endplate spondylosis or hypertrophic degenerative change. The intervertebral disc has a corresponding protrusion which is central to left paracentral. There is some compromise of the

central canal and apparent displacement of the traversing cervical cord at this level. He also wrote that "the examinations are not appreciably or objectively changed between 12/12/97 and 10/23/2001 , which was clearly incorrect. He also believed, without evidence, that the hernia pre-existed the injury. Dr. Munier, 10/29/2002 letter to attorney McAllister.

76. My physician viewed me as in worse condition than did Munier. In a letter to Attorney Jacqueline Jacobson, Hacker disagreed with Munier. Letter was dated 2/20/2003 . It appears that both radiologists and myself have a different opinion than Dr. Munier in regard to the significance of the disc herniation and significance of the disc herniation and its size. Hacker believed the hernia larger and worse. Munier's "characterization" appears quite incorrect.

77. My then attorney, Mr. Welch, in letter of 2/25/2003, requested to Liberty that it accept herniated disc C4-5 as directly caused by injury of Nov 4, 1989 or as having developed as consequence thereof.

78. Dr. Greg Bear did a new MRI on my cervical spine, on 3/20/2003 . He found expansion of my condition into lumbar region and possible nerve involvement now. "Mild degenerative disk disease from L3-4 through L5-S1; Minor posterior disk bulges/osteophytes at L3-4 and L4-5; consequent compromise at the neural foramina at L4-5, more pronounced on the right. There may be impingement upon the existing portion of the right L4 nerve root."

79. C3-4 became also a problem. Dr. Hacker, note: 4/15/2003: "His most recent MRI study performed 3/22//2003 shows some straightening of the cervical spine and degenerative disc changes at C3-4 and C6-7 with minimal if any canal stenosis". Suspect persistent changes, perhaps with an underlying myelopathy without clear-cut ongoing compression.

80. There was another MRI: see Fax cover sheet to LNW from Hacker: refers to Cervical MRI of 3-20-03

81. Spondylosis was by now considered chronic by examining doctor. See Lippincott exam

4/30/2003 : "chronic cervical spondylosis with history of cervical fusion at C5-6 on 1998 and C4-5 in 2002. Rest of his report found little problem with me. "A recent MRI study, however, does not show signs of compression of the spinal cord or exiting nerve roots. While the deep tendon reflexes are symmetrically brisk ..., I do not see any other signs to suggest active myelopathy. I also do not see signs on examination to suggest an intracranial abnormality." And, though he wrote "Lumbar spondylosis", no signs of active radicular disease or lumbar stenosis," he also wrote "Poor endurance in the legs could, however, be related to lumbar stenosis. An MRI scan of the lumbar spine in Feb 2002 showed only mild stenosis at L3-4. Remote closed head injury in 1989. An MRI scan in 1991 did not show any signs of structural abnormalities of the brain."

82. Liberty denied that the C4-5 disc herniation was a result of work injuries. See letter to me from Liberty: 5/23/2003 Claim Denial letter, re injury 11/4/89; Denial of C4-5 disc herniation as result of off work activities or result of new injury while employed with a new employer.

83. Liberty next gave me a partial denial of claim, see Insurer's Rpt - 5/27/2003, partially denied.

84. Liberty opposed reopening the case, in a letter to the Own Motion Unit at WCB dated 6/13/2003 , based on technical argument: "Our position is that this motion is actually a new, but unrelated condition, and therefore, continue to recommend denial of reopening for Own Motion benefits." Also see "Carriers Own Motion Recommendation form: "claimant submitted claim for a compensable new medical condition or omitted medical condition and the claim was initiated after expiration of aggravation rights". (Note: At this point, the "accepted conditions" were: cervical strain, C5-6 herniation; the C4-5 herniation not accepted. It had been operated upon 15 months earlier.)

85. Dr. Theuson concluded I had permanent impairment. See 8/12/2003 , Theuson: Workers and Physicians Report for W/C Claims " "cannot lift greater than 20 pounds occasionally. Limit standing or walking." "Has the injury/illness caused permanent impairment?" Answer: Yes.

86. I had another MRI, of my lumbar spine 8/19/2003 , and it found the degenerative changes and other problems expanding into my lumbar region, and evidence of possible nerve impingement. It found "Mild degenerative disk disease from L3-4 through L5-S1; minor posterior disk bulges/osteophytes at L3-4 and L4-5; consequent compromise at the neural foramina at L4-5, more pronounced on right. There may be impingement upon the exiting portion of the right L4 nerve root." MRI report Dr Greg Bear 8/19/03 .

87. It was now clear I would have a lifetime of pain and problems. See Ltr by Dr. Hacker to Ada Wainmayer, WC Division, "I expect that Mr. Johnston will likely have a lifetime problem with cervical myelopathy," dated 11/5/2003 .

88. There was a possible settlement negotiated by my then-attorney Brian Welch. I was very unhappy with it. It made an offer I had not authorized. Letter to me by Welch, dated 4/23/04) Also, Liberty had reopened an issue left behind by the medical history, the red herring that I had carpal tunnel. See letter from Welch to atty Sally Curey (Liberty) 4/12/04 Note that Liberty was asked to delete reference to carpal tunnel.

89. My then attorney got Liberty into a STIPULATION on 2/4/05 : Liberty accepted the C4-5 herniation. I was, however, not happy with the stipulations; I wanted greater compensation. See my letter dated 3/2/05 to WC Bd,

90. I was also becoming less employable, with little hope of going back to being a bouncer, and work as a cook was also unwise. See Note to Liberty NW, from Hacker: "I don't think he can return to any vigorous demand job with cervical myelopathy." 3/4/05

91. Liberty finally accepted C4-5 disc herniation, though still clinging to claim it was "strain" in larger part. See Modified Notice of Acceptance, from Liberty , accepts "Cervical and lumbar strain, C4-5 disc herniation" dated 3/4/05

92. On 3/7/05 a check was sent to me by Liberty for \$9,847. There was no explanation of how calculated, what was included in or out.

93. On 3/21/2005 WCB issued an Order of Abatement, referring to my previous letter to them, and gave the attorneys involved 14 days to respond.

94. Stenosis was confirmed, along with neural encroachment in my cervical spine. See Diagnostic Imaging Rpt, 3/30/05 date visit, signed 4/06/05 Dr. Bear: MRI of cervical spine found: "Multi-level fusion; Posterior disk bulges/osteophytes at most cervical levels C3-4, C4-5, C5-6, C6-7 are more pronounced to left of midline. There is resultant mild to moderate stenosis. There is also encroachment on numerous neural foramina, most severe on the left at C6-7. Correlate with clinical evidence of compression of the left C7 nerve root. There may also be impingement of the left C4 through C6 nerve roots."

95. The regions with stenosis and other problems grew more numerous. Another Diagnostic Imaging Rpt (this time of lumbar region), of the same date as above, 3/30/05 date visit, signed 4/06/05 Dr. Bear: MRI lumbar spine, found: T12-L1, mild posterior disk bulge/osteophyte, with mild spinal stenosis. L3-4, mild broad-based posterior disk bulge/osteophyte with mild spinal stenosis. Nerve root exits freely. L3 nerve exists without impingement. L4-5 mild posterior disk bulge/osteophyte. No significant compromise at the spinal canal. There is mild encroachment on the neural foramina, without definite root impingement. L5-S1, degenerative changes in the facet joints.

96. Dr. Theuson found me 41 percent impaired, attributable to the two injuries. Ltr to Tracy at Liberty from Theuson, found 41% impairment. "Estimate 60% of problem is from his injury, rest, degenerative or from prior injury." "The worker is not able to do the work he used to do prior to his injury. He is capable of reduced work hours with different work duties. He is able to lift 5 lbs continuously, 10 lbs occasionally, 25 lbs rarely. He also set limits against work that requires stooping, bending, crouching, crawling, kneeling, climbing, balancing. He has significant limitations in twisting, reaching, pushing, pulling as well." (This is undated, but states it is after seeing Ed March 18 and 31st, which was in 2005.

97. I wrote to John Schiltz, WC Director, and ALJ Hoquet, saying the system has failed me and

that there has been mysteriously disappeared medical evidence. Letter dated April 17, 2005 .

98. The attorney for Liberty , Sally Curey, argued to let the dismissal of my most recent request for additional compensation and additional accepted conditions stand unchanged. At this point, the C5-6 injury and associated operation were still not accepted by Liberty . Workers Compensation was not taking them to task. See 4/25/05 Ltr from Curey to ALJ, saying basically, let the Dismissal stand, heâ€™s got his C4-5 acceptance.

99. WCB sent me for an Independent Medical Exam, at Star Medical, by Paul Williams, MD. The exam was on 4/22/05 On the issues of permanent impairment and work limits, he contradicted the medical opinion of my doctor, Dr. Theuson. Williams found me medically stationary for the accepted conditions, and wrote â€œThere is no permanent impairment associated with a cervical or lumbar strain due to range of motion.â€œ His recommendation was that I â€œMay lift occasionally 50 pounds frequently, more or less weight.â€œ â€œThere is no impairment related to a cervical or lumbar strain.â€œ Even so, he also accepted that â€œThe C4-5 disc herniation has been accepted as it relates to the work related event of 07/28/01 , and apparently was 100% caused by the work activity of 07/28/01 .â€œ He also wrote that â€œThere is impairment associated with the C4-5 disc herniation.â€œ And he also wrote, â€œMr. Johnston will likely experience intermittent and transient increase in neck pain.â€œ See Star Medical report 4/22/05 .

100. There was a further attempt to annoy or harass Dr. Theuson on 5/2/05 . It was a â€œPlease Rushâ€œ faxed ltr to Theuson from Tracy at Liberty , asking his concurrence with the relatively modest findings of the Star Medical exam. Theuson did not, generally, concur. In response, in a 5/5/05 letter to Liberty , â€œYes, I would consider his acute lumbar/cervical strain with C4-5 cervical disc herniation medically stationary as does your IME.â€œ But he found my Ranges of Motion not normal, indicating â€œa whole person impairment of 41%,â€œ and agreed with IME this is not normal for me. He stated â€œat least in his neck (this) is obviously due to his injury and subsequent surgery. This should be attributed to the herniated disc which is what the final diagnosis was concerning his injury rather than the original diagnosis of cervical strain

only. As to work load limits, Theuson disagreed with IME Williams. Objectively it would seem he is more capable than this but if his fatigability is accurate then he should not be expected to work in any task that requires stooping, bending, crouching, crawling, kneeling, climbing, balancing. He has significant limitations in twisting, reaching, pushing, pulling as well.

101. The insurer accepted my claim of aggravation and disabling injury. See Insurers Report 5/18/05 Accepted, disabling injury, aggravation. First report of aggravation 2/22/2005 .

102. Liberty accepted the C4-5 disc hernia injury. C6-7 still was not on the accepted list. As noted above, both sites had been operated open. See text: accepted conditions: cervical and lumbar strain, C4-5 disc herniation. Reopened for the following Conditions: C4-5 disc herniation. Date of injury 7/28/01 . Classified as Disabling. Modified Notice of Acceptance Dtd 5/18/2005

103. Liberty accepted some restricted duty for me. Accepted injury as disabling (box checked). Insurer Notice of Closure Summary 5/18/05 restricted duty.

104. Liberty appeared to change its mind regarding disabling nature of the injuries. Updated Notice of Acceptance at Closure dtd 6/15/2005 : (repeated text of above except for not checking box stating it is disabling).

105. I was given 46 percent disability. Notice of Closure Worksheet: 46%, and total dollars \$34,027. See Worksheet 6/15/05

106. I was deemed medically stationary, and my aggravating rights given an end date. See Notice of Closure 6/15/05 saying I became medically stationary 12/16/02 and my aggravating rights end 7/28/06 . It found I had 46% disability, and payment for that was \$34,027.

107. That figure was indicated as approximately \$2,000 too high, indicated by hand written figures on Statement/Request. To Liberty from WC Div. dated 6/21/05

108. Case was closed by insurer. See Insurer Notice of Closure Summary: dtd 6/21/2005

109. Liberty changed its mind, wanted to further reduce compensation. See Liberty : Rescinding Notice of Closure: replaces prior Notice of Closure. 42%, dollar amount of disability is \$28,619.77 now. Dtd 6/21/05

110. There were then some technical issues that confused matters but do not appear to have had any big effect on my status. (Ltr from WC Div to Liberty: June 21 Notice of Closure not meet statutory requirements " wrong form, provided no medically stationary date of aggravation rights end date; no form 2807 (Notice of Closure Worksheet) or Updated Notice of Acceptance at Closure provided. Dtd 7/5/05)

111. I was given 42% disability at the end of what appears was that process of repairing the technical mistakes. Notice of Closure Worksheet 7/22 " 42% disability.

112. Liberty re-opened case for C4-5 herniation. Updated Notice of Acceptance at Closure: accepted conditions: cervical & lumbar strain, C4-5 herniation. Reopened for C4-5 disc herniation.

113. I was given, again, a finding of 42% disability, and my aggravation rights were to end 7/28/06 . Notice of Closure 7/25/05 .

114. The total medical costs paid on my behalf were stated as \$25,319 and time loss for me \$9,847, a fraction of one year's work. Notice of Closure Summary 7/25/05 . This was four years after the second injury.

115. On July 25, 2005 , in the same document noted above in the Insurer Notice of Closure Summary, Liberty identified me as a "Return to work type" that could not return to "job at injury" nor to "job at aggravation" and indeed, checked the box "No Job." " " contrary to its previous conclusions about my employability.

116. I filed a Worker Request for Reconsideration, arguing that the compensation was too small, the aggravation reality would continue, and the

injuries were worse than stated by WCB. Dated 9/21/05

117. Liberty sought to nail down a prior medically stationary date, and it was now back to the 2002 date; Theuson did not agree. See 10/5/05 Liberty fax to Theuson. Do you confirm he was med stationary 12-16-02. Answer: No. 12/02 was a guesstimate [text unclear] he was medically stationary as date May 5, 2005. Dated 10/5/2005

118. Notice of Postponement of Reconsideration, dated 10/14/05 from the WC office, with a list of six doctors to choose from. Shortly thereafter, there was a choice, by Liberty, of Dr. Throop, and a No Conflict of Interest letter signed by Dr Throop and dated 10/24/05. This examination is only for the newly accepted condition of C4-5 disc herniation. This was three years after my operation for C4-5 hernia.

119. Dr. Throop's medical exam report, dated 11/15/05, went contrary to the great weight of prior medical evaluations. He found no evidence of peripheral nerve or nerve root malfunction. Also, there is no limitation to repetitive use of the cervical spine. And, he wrote, "The only abnormal finding is a decreased range of motion and this is due to his severe diffuse degenerative disease of the cervical spine at a 94% level. The degenerative disease is unrelated to the C4-5 disk herniation." He said I can "Occasionally carry 50 pounds, frequently 35, constantly 25" and "sit, stand, and walk eight hours. There is no preclusion from any of the activities listed." His work addressed only C4-5.

120. Throop's report drove the ORDER ON RECONSIDERATION, by ALJ Ogawa, on 11/28/05, in reviewing the "newly accepted condition of C4-5 herniation." She would, Ogawa wrote, use the Throop report, because she found it "thorough and persuasive." With that, she cut the payment to me to \$5,875 and my disability to a mere 12 percent disability, down from 42%. (itself down from 46%).

121. Order of Dismissal dated Jan. 10, 2006 signed by Board members Lowell and Biehl

ASSIGNMENTS OF ERROR

The Workers Compensation Board in its Order On Review made the following errors:

- A. It mistakenly failed to overturn Ogawa's finding of "no spinal stenosis" in my case;
- B. It mistakenly failed to overturn Ogawa's finding that no relevant physician had found me not medically stationary or worse;
- C. It mistakenly failed to address the "closed head injury" in my case;
- D. It mistakenly failed to overturn ALJ Ogawa's decision, which it should have overturned on grounds I am totally or near totally disabled due to my initial, continuing, expanding and worsening medical conditions;
- E. It mistakenly failed to overturn Administrative Law Judge Ogawa's mistaken refusal to address my first, as well as my second injury;
- F. It mistakenly failed to address ALJ Ogawa's failure to assess the evidence of harassment and pressuring of my doctors, loss of evidence, by Liberty Northwest;
- G. And mistakenly failed to overturn ALJ Ogawa's decision not to award me compensation and increased disability percentage, as a permanent disability as appropriate for my harms and losses, my loss of employment, and my medical expenses.

A. The Workers Compensation Board mistakenly failed to overturn Ogawa's finding of "no spinal stenosis" in my case;

The ALJ found, and the WC Board mistakenly upheld, that there is no Stenosis at C4-5 and also that the Stenosis at C4-5 did not come from the injury.

Spinal stenosis is defined as "narrowing of the spinal canal."

The spinal canal will be narrowed when other parts of the body around it swell up or intrude into that canal.

ALJ Ogawa addressed C4-5 because she stayed with reviewing only the second injury, which affected, at least initially, C4-5. In her Order On Reconsideration she wrote that (page 3 of 4) "Here, the medical evidence does not clearly establish that the March 2005 MRI findings of spinal stenosis stem from the accepted C4-5 disc condition." She then goes on to, contradictorily, state (same paragraph) that "Spinal stenosis was not reported at the C4-5 disc level."

I do not see how there can be no stenosis reported at C4-5 when there is also a failure to "establish that the March 2005 MRI findings of spinal stenosis stem from the accepted C4-5 disc condition." Obviously, there was and is a finding of stenosis at C4-5. On this basis alone, the Board should have overturned Ogawa's decision.

The Samaritan Pacific Communities Hospital Diagnostic Imaging Report for exam date 03/30/2005 relating to an MRI of the cervical spine by Dr. Greg Bear (EXHIBIT 12), performed for Dr. Theuson confirmed this. It reported that at C4-5 "There is a mild to moderate broad-based posterior disk bulge/osteophyte, with minor AP narrowing of the spinal canal. There is mild to moderate narrowing of the right neural foramen, and moderate narrowing on the left." (Emphasis added.)

There were other findings of stenosis.

See, much earlier, 2/27/02 MRI of lumbar spine, notes by Dr. Greg Bear. "There is mild disc space narrowing from L3-4 through L5-S1; these discs also demonstrate decreased signal intensity consistent with desiccation. L3-4 mild broad-based posterior disc bulge, resulting in mild stenosis of the spinal canal. There is mild encroachment on both neural foramina, but no evident impingement upon the existing nerve roots. L4-5. there is a broad-based posterior disc bulge/osteocyte, resulting in minimal stenosis of the spinal canal. The disc bulge is slightly more pronounced posterolaterally to the right."

There was stenosis found elsewhere, too. See Lippincott exam 4/30/2003 : "He wrote "Lumbar spondylosis" no signs of active radicular disease or lumbar stenosis," but he also wrote "Poor endurance in the legs could, however, be related to lumbar stenosis. An MRI scan of the lumbar spine in Feb 2002

showed only mild stenosis at L3-4.â€œ

Whatever the prior medical disagreements, stenosis was confirmed, along with neural encroachment in my cervical spine in 2005. See Diagnostic Imaging Rpt, 3/30/05 date visit, signed 4/06/05 Dr. Bear: MRI of cervical spine found: â€œMulti-level fusion; Posterior disk bulges/osteophytes at most cervical levelsâ€œâ€œ C3-4, C4-5, C5-6, C6-7 â€œâ€œmore pronounced to left of midline. There is resultant mild to moderate stenosisâ€œ There is also encroachment on numerous neural foramina, most severe on the left at C6-7. Correlate with clinical evidence of compression of the left C7 nerve root. There may also be impingement of the left C4 through C6 nerve roots.â€œ

The regions with stenosis grew more numerous over time. Another Diagnostic Imaging Rpt (this time of lumbar region), also taken 3/30/05 and signed 4/06/05 by Dr. Bear addressed MRIs taken of my lumbar spine. These found: â€œT12-L1, mild posterior disk bulge/osteophyte, with mild spinal stenosis. L3-4, mild broad-based posterior disk bulge/osteophyte with mild spinal stenosis. Nerve root exits freely. L3 nerve exists without impingement. L4-5 mild posterior disk bulge/osteophyte. No significant compromise at the spinal canal. There is mild encroachment on the neural foramina, without definite root impingement.â€œ

In addition, there are numerous statements in the medical record regarding osteophytes â€œ bulges â€œ some of which are identified as going outward away from the canal, but some of which are not specified as to whether they went inward or outward, or went in both directions. There are also several comments about encroachment into the spinal canal, which would be by definition equivalent to stenosisâ€™ narrowing of the canal.

Ogawa also asserted that the C4-5 stenosis did not come from the injury (second injury, July 28, 2001) she was addressing. But then what did the C4-5 stenosis come from?

The question becomes what other source beside the â€œaccepted conditionâ€œthe stenosis could come from. I am not a doctor and do not know the universe of possible answers, but it seems to me that if it did not come from the injury that underlay the â€œaccepted condition,â€œit must have come from degenerative

changes. I quote from the Nov. 15, 2005 letter from Dr. Throop (Exhibit 9). (page 4): "The degenerative disease is unrelated to the C4-5 disk herniation condition. If degenerative disease is unrelated, the stenosis must have come from the underlying injury-based, accepted condition.

B. The Workers Compensation Board mistakenly failed to overturn Ogawa's finding that no physician had found me not medically stationary or worse in regards to C4-5.

The record on "medically stationary or worse"

Ogawa centrally asserted, though she did so in a footnote (FN number 1) that "Neither Dr. Theuson, who last saw claimant in July 2005, nor Dr. Throop, who saw claimant in November 2005, indicated that claimant's C4-5 disc condition was not medically stationary or was worse. Rather, Dr. Theuson noted in May 2005 that claimant would probably have gradual deterioration due to aging. Dr. Theuson also reported that, although claimant stated he had worsened, Dr. Theuson found little change, objectively, since the March 2002 surgery."

These were not, however, the only doctors to offer an opinion or observation relevant to the issue of me being medically stationary or worse, and I will quote from evidence from various doctors on the subject.

Right at the start, I was found not then medically stationary. See Supplemental Med Report 828 by Dr. Gilbert Lee describing me as not medically stationary, dated 12/26/89 .

Six months later, Dr. Gilbert would not release me for work, and could not give a date when I might be medically stationary. See Supplemental Med Report 828 by Dr. Gilbert Lee dtd 6/6/90 .

The pain from the injury grew wider over the next few months. See Note by Dr. Lee stating "the pain is now in the back of his head, neck and upper back." It was dated 4/12/90 .

I was found to have a herniated disc at C5-6, on the left, capable of modified, but not regular work, and not medically stationary. See "Impressions" section of letter of Western Medical Consultants, Dr Thomas

Gritzka, Orthopedist, and R. Glenn Snodgrass, neurologist, dtd 1/17/91.

In February 1991, Dr. Bernstein concluded in a qualified and uncertain manner that I was medically stationary but needed physical therapy 3x per week. Letter from Dr. Bernstein dtd 2/11/91 . But then, the actual text was "I believe that he is currently medically stationary", but that he also believed that Johnston will need three times a week physical therapy for the next three months in order to maintain that. As was noted in another document, this appears to have been a coerced and qualified statement (that) does not even come close to a medically stationary finding, despite the use of the "magic" words. See Document with text "Request for Reconsideration, Page 2" at the top, the origin of which is unclear, but probably from an attorney for me. The date is not given. It is attached to a Request for Reconsideration sheet. See its 3rd paragraph.

In 1997, I was found to have some degenerative change at C4-5 and C5-6 consisting primarily of intervertebral disc narrowing and anterior bulging. There is some suggestion of spasm. PCH Diagnostic Imaging Report 9/22/97 . I could not have been degenerating and also been medically stationary.

From her language, it is not clear if Ogawa meant what she wrote "that I had not been found not medically stationary (that is, at all, in any regard) or solely as regards the C4-5 injury. She was addressing the C4-5 injury, but her language seems plain enough and to the contrary, all-inclusive. The above is from before the second injury (on 7/28/01) which led to my second operation (3/4/02), on C4-5. The below is from documents after that date, when a finding of medically stationary or not could relate to conditions caused by either or both injuries unless specified as relating to a particular condition, or the condition not stationary is identifiable from the context.

My condition continued to get worse. There was now identifiable compression on my spinal chord. See Diagnostic Imaging Report 10/23/01 Dr Gary Theuson. "Broad based disc protrusion C4-5 which is slightly biased to the left and compresses the cord along its ventral surface." This directly contradicts Ogawa.

I had another MRI which made it clear my neck at C4-5

was in fact getting worse. See 11/26/01 Hacker ltr:
â€œCurrent Complaint.â€ A review of his MRI scan
confirms spinal cord compression and a disc herniation
at the C4-5 level â€ Cervical myelopathy due to disc
hernia, C4-5.â€ The spinal chord compression was a
new finding, and helped lead to my second surgery.

The 3/4/2002 STAT REPORT: NAME OF OPERATION document
described my second operation, the one on C4-5 â€ the
subject of Ogawaâ€™s Order. It stated: Anterior cervical
microdiscectomy with canal decompression with
instrumented interbody fusion with allograft C4-5,
with repeat exposure and explanation of previous
fixation plates C5-6. PREOPERATIVE DIAGNOSIS:
transition segment disease with cervical spondylotic
myelopathy with disk hernia C4-5. POSTOPERATIVE
DISAGNOSIS (same). FINDINGS: Spinal cord compression
was obvious at the C4-5 level due to disc protrusion,
as well as bony osteophyte formation.

On Oct. 29, 2002 , Dr. Paul Meunier wrote to attorney
Conway McAllister (EXHIBIT 10) about my case. â€œI have
for comparison two MRI examinations dated 12/12/1997
and 10/23/2001 . Additionally, I have a number of
x-ray examinations dated 04/09/1998 , 07/22/1998 ,
02/03/1999 and 11/26/2001 . â€ There is some disc space
narrowing at C4-5 and early posterior osteophytic
ridging at this same level. There is a small linear
calcification anterior to the C4-5 disc level which
appears to be ligamentous in origin. Accounting for
differences in position and technique, the
examinations likewise reveal stable findings at the
C4-5 disc level. The findings on MRI correspond with
the findings on plain film examination. There is
vertebral body endplate spondylosis or hypertrophic
degenerative change. The intervertebral disc has a
corresponding protrusion which is central to left
paracentral. There is some compromise of the central
canal and apparent displacement of the traversing
cervical cord at this level. â€

The Samaritan Pacific Communities Hospital Diagnostic
Imaging Report (DIR) for exam date 03/30/2005 relating
to an MRI of the cervical spine by Dr. Bear, performed
for Dr. Theuson. (EXHIBIT 5) It reported that at C4-5
â€œThere is a mild to moderate broad-based posterior
disk bulge/osteophyte, with minor AP narrowing of the
spinal canal. There is mild to moderate narrowing of
the right neural foramen, and moderate narrowing on
the left.â€ The active changes â€ â€œnarrowingâ€(twice

noted) are compared, evidently, to the Plain films dated August 16, 2002 that also were reviewed by Dr. Bear. This comparison clearly indicates changed and worsened conditions since that time (i.e., August 2002, after the March 2002 surgery). This DRI also states that "The AP diameter of the spinal canal is narrowed from C3-4 through C6-7." That, obviously, must include C4-5. To be narrowed, it had to have changed, for the worse. (Note also that this MRI found further worsening conditions at C3-4, C5-6 AND C6-7, also.)

I had two MRIs done on 3/30/2005 by Dr. Bear, one on my cervical region, one on lumbar. The Diagnostic Imaging Report, signed 4/06/05 by Dr. Bear, reported that the cervical spine (EXHIBIT 62) MRI found: "Multi-level fusion; Posterior disk bulges/osteophytes at most cervical levels (C3-4, C4-5, C5-6, C6-7) more pronounced to left of midline. There is resultant mild to moderate stenosis. There is also encroachment on numerous neural foramina, most severe on the left at C6-7. Correlate with clinical evidence of compression of the left C7 nerve root. There may also be impingement of the left C4 through C6 nerve roots."

I was getting worse generally, and there was now also possible impingement on the C4-5 nerve.

Thus, from the Oct. 29, 2002 exam noted above to the 03/03/2005 exam, it appears there have been worsened conditions., contrary to Ogawa's conclusion.

WCB sent me for an Independent Medical Exam, at Star Medical, by Paul Williams, MD. The exam was on 4/22/05. On the issues of permanent impairment and work limits, he found me medically stationary for the accepted conditions. Note that the accepted conditions did not include anything relating to C4-5. Therefore, if Ogawa meant to refer only to the C4-5 question, this claim of medically stationary is irrelevant.

Dr. Theuson found me 41 percent impaired, attributable to the two injuries. In a letter to Tracy at Liberty from Theuson, found 41% impairment. "Estimate 60% of problem is from his injury, rest, degenerative or from prior injury." "The worker is not able to do the work he used to do prior to his injury. He is capable of reduced work hours with different work duties. He is able to lift 5 lbs continuously, 10 lbs occasionally, 25 lbs rarely. He also set limits against work that

requires stooping, bending, crouching, crawling, kneeling, climbing, balancing. He has significant limitations in twisting, reaching, pushing, pulling as well. (This is undated, but states it is after seeing Ed March 18 and 31st, I believe, in 2005.) While the date is uncertain, it clearly is not logical to think a person medically stationary if he could be further harmed by twisting, reaching, pushing and pulling, and by stooping, bending, crawling, kneeling, climbing or balancing.

These limitations were reiterated by Dr. Theuson on 5/2/05 .

There was an faxed letter to Dr. Theuson on 5/2/05 , from Tracey at Liberty NW. It was a "Please Rush" letter asking his concurrence with the Star Medical exam. Theuson gave a mixed reply. In response, in a 5/5/05 letter to Liberty , "Yes, I would consider his acute lumbar/cervical strain with C4-5 cervical disc herniation medically stationary as does your IME." But he found my Ranges of Motion not normal, indicating "a whole person impairment of 41%," and that this is not normal for me. He stated "at least in his neck (this) is obviously due to his injury and subsequent surgery. This should be attributed to the herniated disc which is what the final diagnosis was concerning his injury rather than the original diagnosis of cervical strain only." This would suggest that, if all I had at the start was "strain," I was getting worse. As to work load limits, Theuson disagreed with IME Williams. "Objectively it would seem he is more capable than this but if his fatigability is accurate then he should not be expected to work in any task that requires stooping, bending, crouching, crawling, kneeling, climbing, balancing. He has significant limitations in twisting, reaching, pushing, pulling as well." This does not sound like a medically stationary situation, if pushing and pulling, reaching or twisting could worsen my condition.

Generally, I was deteriorating, and so not medically stationary

There is a lot of evidence in support of the point about my general medical trajectory making it clear I have not been and am not, medically stationary. For instance:

The injury was initially described as "acute strain"

and "non disabling" by the insurer, Liberty Northwest. See the Notice of Claim Acceptance for 11/4/89 injury issued by Liberty Northwest Insurance, dated Dec. 13, 1989 ,

Doctor Hacker, my neurosurgeon, confirmed in a note dated 7/27/98, "the fact that the patient found the onset of his symptoms with the injury described would point to the injury as being the major contributing cause of his disk herniation and need for surgical treatment." Since I had not been deemed needing surgery at the outset, obviously, I was not medically stationary.

I had another MRI in February 2002. It showed that things were getting worse now in my spine; that is, the deterioration was spreading. See 2/27/02 MRI of lumbar spine, notes by Dr. Greg Bear. "There is mild disc space narrowing from L3-4 through L5-S1; these discs also demonstrate decreased signal intensity consistent with desiccation. There is somewhat prominent lumbosacral lordosis. L3-4 mild broad-based posterior disc bulge, resulting in mild stenosis of the spinal canal. There is mild encroachment on both neural foramina, but no evident impingement upon the existing nerve roots. L4-5. there is a broad-based posterior disc bulge/osteocyte, resulting in minimal stenosis of the spinal canal. The disc bulge is slightly more pronounced posterolaterally to the right. There are mild hypertrophic changes in the facets. These factors combine to result in encroachment upon the right neural foramen. There is mild partial effacement of the perineural fat planes associated with the existing portion of the right L4 nerve root. It also found problems at C4-5, which led to my second operation. See the 3/4/2002 STAT REPORT: NAME OF OPERATION: It described this operation: Anterior cervical microdiscectomy with canal decompression with instrumented interbody fusion with allograft C4-5, with repeat exposure and explanation of previous fixation plates C5-6. PREOPERATIVE DIAGNOSIS: transition segment disease with cervical spondylotic myelopathy with disk hernia C4-5. POSTOPERATIVE DISAGNOSIS (same). FINDINGS: Spinal cord compression was obvious at the C4-5 level due to disc protrusion, as well as bony osteophyte formation./////// At the conclusion the canal was thoroughly decompressed with satisfactorily positioned 8 mm allograft in place at C4-5 interspace. The previous Orion plate had been

removed at C4-5 and a new plate positioned at C4-5. It was signed by Dr. Robert Hacker.

Even Dr. Throop – the Independent Medical Examiner, upon whom ALJ Ogawa so heavily depends - stated in his Nov. 15, 2005 letter (EXHIBIT 9) to Tamara L. Schnack at WCD (page 1) – “The last MRI scan was done on 03/30/05, which showed a number of disk bulges at the cervical level and osteophytes at all levels, with multiple areas of foraminal encroachment, especially at C6-7 on the left and at C-4 on the left. There was multiple spinal stenosis at multiple levels. This represented a continued broadening of my medical problems – a worse condition. (We note that C-4 has to have been intended as C4-5.) I note that the foraminal encroachment was new at that point

To get a visually clearer picture of the reality of my continued deterioration, please see the Spreadsheet – Ed’s Medical History, a timeline, which is in the file. It makes clear that the continued worsening at the initial injury sites and the continued spread of medical problems to additional areas – and their subsequent worsening – makes clear that the various medial reports and exams, whether by IMEs or otherwise, that downplayed, minimized or dismissed my ailments were clearly wrong. The attempts to minimize my medical problems are shown up as false best over time, and the time line spreadsheet may be the clearest and most dramatic way of showing that.

C. The WC Board and ALJ Ogawa mistakenly failed to address the “closed head injury” in my case.

Under 436-001-0170 (1), “The administrative law judge may conduct the hearing in any manner, consistent with these rules, that will achieve substantial justice,” and (6) “The administrative law judge may consolidate matters in which there are common parties or common issues of law or fact.”

The medical record from that First Injury clearly includes discussion of a closed head injury from that first incident. I asked the ALJ and WC Board to include that, and they did not. They could have, in the interests of justice, with their authority to consolidate “matters” with common parties or issues. Not doing so was against the interests of justice.

The original 1989 injury, for which Liberty NW totally

disabled me on 5/31/90 , referenced C4-5 and C5-6 and
“closed head injury.”(EXHIBIT 13) Liberty NW in
fact, gave me a total disability finding in 1990 for
C4-5 and C5-6 and closed head injury. Thereafter, the
recognition of the closed head injury by Liberty and
by the Workers Compensation Division dropped off their
computers. Note that the closed head injury is
mentioned in the July 9, 1990 letter to Liberty from
Drs. Stanford and Barth at BBV medical service
(EXHIBIT 14) “ even before the cervical disc injuries
had been properly identified as significantly more
than “strains.”On Jan. 17, 1991 , Western Medical
Consultants, Dr. Grizka and Dr. Snodgrass (EXHIBIT 15)
also found closed head injury, as well as other
injuries. I have never received compensation for this,
nor even a review of it.

D. The Workers Compensation Board mistakenly
failed to overturn ALJ Ogawa’s decision, which it
should have overturned on grounds I am totally or near
totally disabled due to my initial, continuing,
expanding and worsening medical conditions;

I also requested of Ogawa and then of the Board that I
be granted (a) total disability, returning back to the
First Injury, (b) full and total compensation of all
medical expenses incurred, (c) full and fair
compensation for lost income. I believe not being
granted these requests was a mistake by the Board.

Ogawa found I had a mere 12 percent disability.

Here’s the history of it:

This began with Liberty NW Insurance concluding I was
totally disabled. Liberty in 1990 for C4-5 and C5-6
and closed head injury. (See Exhibit 13)

I was found to have an “Unscheduled permanent partial
disability of 25.6 degrees for 8 percent equal to
\$2,500 for neck.”Time loss compensation paid is given
as \$7,958; medical compensation paid \$22,139 in the
10/25/91 Notice of Closure, Workers Comp. Div., for
the first injury.

On May 7, 1992 , the Workers Compensation ORDER ON
RECONSIDERATION (EXHIBIT 19) reduced what had by then
become my partial disability “to NONE.”The logic of
this escaped me at the time and still escapes me. That
decision did not, however, make the pain go away. I

had pain, and even some black-outs, subsequently.

Workers Comp board next gave me 15% for unscheduled neck and left shoulder permanent partial disability and allocated monies. Misbehavior by Workers Compensation Div. was noted in this document by the Board finding itself, where it states "The award was reduced to zero by Order on Reconsideration dated May 7, 1992 on a finding of no impairment by Dr. Stanford the appointed medical arbiter. "Dr. Stanford, should not have been appointed medical arbiter since he was previously involved with this case as an agent of a party" That party was the insurance company, for which Dr. Stanford acted as consultant. (page 3) See Referee D. W. Daughtry OPINION AND ORDER: dated August 26, 1992 . (Underline added.)

Dr. Theuson found me 41 percent impaired, attributable to the two injuries. Ltr to Tracy at Liberty from Theuson, found 41% impairment. "Estimate 60% of problem is from his injury, rest, degenerative or from prior injury." "The worker is not able to do the work he used to do prior to his injury. He is capable of reduced work hours with different work duties. He is able to lift 5 lbs continuously, 10 lbs occasionally, 25 lbs rarely. He also set limits against work that "requires stooping, bending, crouching, crawling, kneeling, climbing, balancing. He has significant limitations in twisting, reaching, pushing, pulling as well." (This is undated, but states it is after seeing me March 18 and 31st, which occurred in 2005.

On June 15, 2005 I was given 46 percent disability. Notice of Closure Worksheet: 46%, and total dollars \$34,027. See Worksheet 6/15/05

Liberty changed its mind, and reduced it, without any hearing or chance for me to have input. See Liberty : Rescinding Notice of Closure: replaces prior Notice of Closure. 42%, dollar amount of disability is \$28,619.77 now. Dtd 6/21/05 .

There were then some technical issues that confused matters but do not appear to have had any effect on my status. (See letter from WC Div to Liberty: June 21 Notice of Closure not meet statutory requirements "wrong form, provided no medically stationary date of aggravation rights end date; no form 2807 (Notice of Closure Worksheet) or Updated Notice of Acceptance at Closure provided. Notice of these issues was dated

7/5/05)

I was given 42% disability at the end of what appears was that process of repairing the technical mistakes.
Notice of Closure Worksheet 7/22/05

Liberty re-opened case for C4-5 herniation. Updated Notice of Acceptance at Closure: they finally accepted the C4-5 herniation as real. (â€œaccepted conditions: cervical & lumbar strain, C4-5 herniation.) and reopened the matter for C4-5 disc herniation. The result was that I was given, again, a finding of 42% disability, and my aggravation rights were to end 7/28/06 . See the Notice of Closure 7/25/05 .

Next came another exam by independent examiner, Dr. Throopâ€™s. His medical exam report, dated 11/15/05 , found â€œno evidence of peripheral nerve or nerve root malfunction.â€œ Also, â€œthere is no limitation to repetitive use of the cervical spine.â€œ And, he wrote, â€œThe only abnormal finding is a decreased range of motion and this is due to his severe diffuse degenerative disease of the cervical spine at a 94% level. The degenerative disease is unrelated to the C4-5 disk herniation. â€œ He said I can â€œOccasionally carry 50 pounds, frequently 35, constantly 25â€œ and â€œsit, stand, and walk eight hours. There is no preclusion from any of the activities listed.â€œ His work addressed only C4-5, but his findings addressed the entirety of my disability, and was used as such by ALJ Ogawa.

Dr. Throopâ€™s report drove the ORDER ON RECONSIDERATION, by ALJ Ogawa, on 11/28/05 , in reviewing the â€œnewly accepted condition of C4-5 herniation.â€œ She would, Ogawa wrote, use the Throop report, because she found it â€œthorough and persuasive.â€œ With that, she cut the payment to me to \$5,875 and my disability to a mere 12 percent disability. By this time, it appears, there as no disability percentage for my C5-6 injuries!

With two major operations, spreading problems that now reach down into my lumbar region, osteophytes, bulges, myelopathy, encroachment on my nerve roots, and my head attached to my neck by a metal plate (can you imagine how that feels), with ongoing treatment for severe pain, and with my physician limiting my work capabilities severely (no pushing or pulling, twisting or reaching) I am now given a 12 percent

disability level.

This is wrong, and the Workers Compensation Board had ample opportunity to correct it, on its Own Motion decision, just as Ogawa could have decided differently. These are errors that should be corrected. But one problem is, how can anybody make a sane determination of my actual disability level, if he or she is reviewing only ONE of my two major ailments – or, actually, one of my now numerous medical problems.

As the record shows, there are now medical problems all up and down my back,. (See, I had another MRI. It showed that things were getting worse now in my spine; that is, the deterioration was spreading. (See 2/27/02 MRI of lumbar spine, notes by Dr. Greg Bear. –There is mild disc space narrowing from L3-4 through L5-S1; these discs also demonstrate decreased signal intensity consistent with desiccation. There is somewhat prominent lumbosacral lordosis. L3-4 mild broad-based posterior disc bulge, resulting in mild stenosis of the spinal canal. There is mild encroachment on both neural foramina, but no evident impingement upon the existing nerve roots. L4-5. there is a broad-based posterior disc bulge/osteocyte, resulting in minimal stenosis of the spinal canal. The disc bulge is slightly more pronounced posterolaterally to the right. There are mild hypertrophic changes in the facets. These factors combine to result in encroachment upon the right neural foramen. There is mild partial effacement of the perineural fat planes associated with the existing portion of the right L4 nerve root. –See also 8/16/02 Diagnostic Imaging Rpt, Samaritan Pacific Communities Hospital. –There (are) inferior plate screws inset at the inferior aspect of the C5-6 disk space, and the disk space appears to be ossified. There are moderate degenerative changes at C6-7. –The immediate prevertebral soft tissues are abnormally thickened at the C3 level. –See also Dr. Larry Wampler 10/09/2002 MRI cervical spine report: C3-4 level reveals mild disk bulging with no focal or discrete herniation and no significant canal or foraminal narrowing. C4-5 and C5-6 levels reveal interbody fusions. –No significant canal or foraminal stenosis. Identified. There appears to be a mild disc bulge at C6-7 with no significant canal or foraminal narrowing. Mild left foraminal narrowing is noted. –See also, Diagnostic Imaging Rpt, 3/30/05 date visit, signed 4/06/05 Dr. Bear: MRI of

cervical spine found: "Multi-level fusion; Posterior disk bulges/osteophytes at most cervical levels" C3-4, C4-5, C5-6, C6-7 "more pronounced to left of midline. There is resultant mild to moderate stenosis. There is also encroachment on numerous neural foramina, most severe on the left at C6-7. Correlate with clinical evidence of compression of the left C7 nerve root. There may also be impingement of the left C4 through C6 nerve roots." See also Diagnostic Imaging Rpt (this time of lumbar region), of the same date as above, 3/30/05 date visit, signed 4/06/05 Dr. Bear: MRI lumbar spine, found: T12-L1, mild posterior disk bulge/osteophyte, with mild spinal stenosis. L3-4, mild broad-based posterior disk bulge/osteophyte with mild spinal stenosis. Nerve root exits freely. L3 nerve exists without impingement. L4-5 mild posterior disk bulge/osteophyte. No significant compromise at the spinal canal. There is mild encroachment on the neural foramina, without definite root impingement. L5-S1, degenerative changes in the facet joints.)

Be that as it may, it would seem to be impossible for any reviewer to make any reasonable conclusion as to my percentage of disability when reviewing only one of the two biggest injuries " the ones that led to surgery, and which continue to be the areas of worst pain " and excluding the other such injury.

E. The Workers Compensation Board mistakenly failed to overturn Administrative Law Judge Ogawa's mistaken refusal to address my first (C5-6), as well as my second (C4-5) injury.

Under 436-001-0170 (1), "The administrative law judge may conduct the hearing in any manner, consistent with these rules, that will achieve substantial justice," and (6) "The administrative law judge may consolidate matters in which there are common parties or common issues of law or fact."

Under OAR 438-001-0037 through 438-001-0061 the Workers Compensation Board the power to take in new matters of claimed injury and/or compensation. It could have done so, and addressed BOTH my cases, rather than just one of them, and failed to do so., including not only the present one but also:

WCB Case No. 03-04430,

Claim No. C604255450,

DOI: 11/04/1989,

WCD File No. G537856,

which addressed my C5-6 injury, also be reviewed here along with the case formally on appeal.

The WC case referred to above regards the extent of and compensation for my C4-5 injury from 2001 at Hallmark Inns & Resorts. This was the second injury to my neck; there was an earlier one, deemed not a part of the process that led to this appeal. However, I have only one neck and have throughout the process insisted on my right to review and compensation for both injuries. Denying me this was a mistake.

The basic background is this:

On Nov. 4, 1989 , while working as a bouncer at the PipTide Restaurant in Newport , insured by Liberty NW, I was beaten over the back of the neck with a pipe. (The injury is referenced in the Notice of Claim Acceptance dated Dec. 13, 1989.) This FIRST INJURY, though initially described by Liberty as "neck strain" (See the Notice of Claim Acceptance for 11/4/89 injury issued by Liberty Northwest Insurance, dated Dec. 13, 1989) was eventually the source of an accepted condition for C5-6. This led to my FIRST SURGERY, an anterior cervical discectomy and fusion at C5-6, done at McKenzie-Willamette Hospital by Physician Robert Hacker 03/03/98 " nearly nine years after the damage was done. (Document, on letterhead of McKenzie-Willamette Hospital, by Physician Robert Hacker, entitled "Name of Operation," dtd 03/03/98.)

I suffered a SECOND INJURY on July 28, 2001, when I slipped and fell in a puddle of water, working as a cook, at Georgie's Grill, a.k.a. (and organizationally a part of) Hallmark Inn. (See Initial Notice of Acceptance, from Liberty : 11/6/2001. for acute cervical and lumbar strains. Non-disabling.)

Both the PipTide and Georgies are insured by Liberty . This second injury affected chiefly my neck C4-5. This led to my SECOND SURGERY, another anterior cervical discectomy and fusion with canal decompression with instrumented interbody fusion with allograft at C4-5 on 3/4/2002 . The underlying case now at issue, the basis of this appeal, addressed the C4-5 injury and

conditions. (See See the 3/4/2002 STAT REPORT: NAME OF OPERATION.)

It is unfair and against the interests of justice to not also address handling of and compensation for the First, C5-6, Injury, as well as the second. That initial injury damaged both vertebrae and more; the later injury worsened both and more. The two vertebrae are next to each other. They are medically, physically and experientially linked. The 2001 event that caused the Second Injury (which is formally on appeal here) might not have caused as bad an injury if the First Injury (in 1989) had not occurred. The effects of the First injury might not now be as bad as it is if the second injury had not happened. The two vertebrae involved in the first and the second injuries are right next to each other in my neck; other vertebrae adjacent to them also show clear and substantial medical evidence of harm and have for a long time. My compensation for the first injury was minimal, and that condition has grown worse since then, in part due to the second injury. Therefore, on December 18, 2006, in the Petition for Review of ALJ Ogawa's decision that I sent to the Workers Compensation Board, I asked the WC Board and the ALJ Ogawa to review that case, too:

WCB Case No. 03-04430,

Claim No. C604255450,

DOI: 11/04/1989,

WCD File No. G537856,

which addressed my C5-6 injury, also be reviewed here along with the case formally on appeal.

In the Transcript of the hearing on which this appeal is based, page 6, ALJ Ogawa states "Any issues regarding the C5-6 condition is what is called under the Board's own motion. I do not have the authority to decide any issues regarding the C5-6. Your C4-5 disc condition was accepted by Liberty under the 2001 injury claim with Hallmark Inns & Resorts. I have the legal authority to decide issues regarding the C4-5 disc condition under the 2001 injury." ©

This appears contradicted by OAR 436-001-0170 (1) and (6)., which gives the ALJ the power to consolidate

matters involving the same parties and/or same issues, and I had raised the issue of the unfairness and inadequacy of the compensation for the initial, C5-6, injury. Further, the WC Board, could, under its Own Motion authority, have opened the scope of Ogawa's hearing on its own.

I believe both Ogawa and, in reviewing her, the WC Board have the authority to review both of my cases and all of my medical conditions.

While C4-5 was "accepted," the benefits that have come to me from this have been minimal. I requested that the Board review and address it now, in the interests of justice, fairness, and expediting the WC Department process (that is, the hope that all the outstanding issues between me and WC Department and Liberty can be addressed at one time, instead of further strung out over yet more years, at more cost to taxpayers and in the hope this can be completed before I die.

My reasonable remaining lifespan is not long, by any reasonable standard. I need only to slip and fall again and I can slice my spinal cord, either killing me or paralyzing me.

Beside the OARs noted above, there is basis in the case history for combining review of both injuries/claims. On July 22, my then attorney Welch wrote Liberty attorney Sally Anne Currey seeking consolidation of hearings on the two different Injuries. (EXHIBIT 1) On July 24, 2003, Liberty NW Insurance lawyer Sally Anne Currey wrote to my then attorney Brian Welch, "First of all, Liberty has no objection, of course, to your moving to combine the two hearings." (EXHIBIT 2) On 8/12/2003 the Board consolidated the hearings on the different claims. (EXHIBIT 3) If it could do so once, it could have done so again. I ask the Appeals Court, as part of any order it issues in this case, to Order the consolidation of these two cases and their underlying injuries, so that the damages and compensation the Appeals Court decides upon will have clear grounding in the record at the Appeals Court.

The C5-6 injury, despite the surgery, worsened over time. Given that worsening, ALJ Ogawa could and should have reopened that matter for review and possible higher disability percentage and higher compensation; so, too, could the Workers Compensation Board. To show

that C5-6 did worsen after it was accepted and minimally compensated for, a history follows.

The C5-6 issue

Liberty accepted the 11/4/89 injury as disabling. See Insurer's Report dated 5-31-1990 .

On Jan. 17, 1991, Western Medical Consultants, Dr. Grizka and Dr. Snodgrass, (see previous Exhibit 15) found (besides a closed head injury), "every small central disc herniation at the C4-5 level, left paracentral disc herniation considered to be present at the C5-6 level, but not well visualized." (Emphasis added.) They found I was "not medically stationary" and that I probably would not be for four months. Thus, the C5-6 injury is shown, again, to have began as a result of the First Injury. My compensation for C5-6 should go all the way back to the First Injury.

On 9/22/97 a Diagnostic Imaging Report taken at Samaritan Pacific Communities Hospital Emergency Room (EXHIBIT 20) found "There is some degenerative change at C4-5 and C5-6 consisting primarily of intervertebral disc narrowing and anterior bulging. There is some suggestion of spasm."

But it was not just degenerative matters or merely spasm, as subsequent medical reviews, and surgery, proved. Two months later, Robert Hacker, Neurosurgeon, wrote (EXHIBIT 21) in a letter to Dr. Cephus Allin (dated 11/12/97): "In my opinion Mr. Johnson may well have a painful cervical spondylosis disorder. ... repeat MRI scan is probably reasonable to determine whether there have been late changes with significant root or spinal cord entrapment."

That was done. There is a letter dated Dec 12, 1997, in which MR Imaging Associates (EXHIBIT 22) wrote to Dr Hacker finding "Abnormality at C5-6 on the left is larger than expected from plain film findings and probably a combination of cervical spondylosis, foraminal narrowing and disc herniation." In December 1997, when the pain had grown excruciating to me, Dr. Hacker recommended surgery on C4-5 and C5-6 discs; Liberty refused to accept 4-5 and accepted only 5-6. In the interim, I had only gotten worse, and who knows what further damage has been done me "first from the initial delay due to Liberty after the surgery became (in my physicians' opinion) worth the risk it

entailed, then due to Liberty's refusal to deem the condition one that needed an operation, and also from Liberty's refusal to support an operation on the 4-5 disc until 2002. With Liberty still denying I had anything worse than cervical strain, it took me till 1997 to get authorization from OMAP for the surgery at C5-6, and OMAP did pay for the surgery, which occurred March 3, 1998 (my first surgery).

On July 30, 1998, a letter from my then attorney Strooband (EXHIBIT 23), notes on page 2 that IME Western Medical on 1/16/91 (Gritzka and Snodgrass) had concluded Mr. Johnston had a herniated disc at C5-6 caused from the work incident of 11/4/89. The attorney's letter then asked Dr Hacker if he had reviewed the Western Med 1/17/91 report and if he agreed or disagreed with Gritzka and Snodgrass regarding existence of a herniated disc at C5-6 and their view that it was due to the 11/4/89 injury. Dr. Hacker circled the "I agree" words.

In (EXHIBIT 24) the July 7, 1998 OWN MOTION ORDER REFERRING FOR CONSOLIDATED HEARING (still, despite all the above, referring to my problem as "acute neck strain", the Board noted that Liberty had denied compensation for "current cervical disc herniation C5-6 left condition." (and) opposes reopening on the following grounds: (1) the insurer is not responsible for claimant's current condition, (2) surgery of hospitalization is not reasonable and necessary for the compensable injury; and (3) claimant was not in the work force at the time of disability. This was wrong because (1) the insurer insured both employers of mine and is only "no responsible" for my condition in the sense it is not responsible for anybody's injury except the injury of persons hurt by an employer or vehicle or other equipment employed or owned by the insurer; (2) the medical record established that surgery was reasonable and necessary for both injuries by the date of that assertion by Liberty, and (3) because I was working at the time, and my claim to the contrary was a bald lie.

In effect, Liberty passed me off to the taxpayer, as a burden to the system. Now, because of what Liberty has done, because of its delays and dishonesty, I am indeed a burden to that system and to the taxpayer, when I should not be. Thus, the issue of compensation of C5-6 should be reopened, because that matter was mishandled by the Liberty, and at points the agency,

over an extended period of years.

The Board, by its OWN MOTION ORDER of Feb 10, 1999 , (EXHIBIT 25) authorized reopening of my 1989 injury claim re: C5-6 to "provide temporary disability compensation beginning March 8, 1998 ..."
(I do not believe I ever got compensation for a decades worth of suffering relating to C5-6 and incapacity " and have not gotten same for continued suffering related to C5-6 and incapacity thereafter to the extent it arose from C5-6. And the compensation I have gotten relating to C4-5 has been fairly minimal.) However, this Order got some of it right. This order states that "on December 21, 1998 , ALJ Spangler issued an Opinion and Order which set aside the insurer's denial. In doing so, ALJ Spangler found the claimant's cervical disk herniation at C5-6 was causally related to the November 1989 compensable injury. The ALJ's order has not been appealed" by Liberty , this noted. (They knew they were lying. But they still haven't paid compensation.) "On March 8, 1998 , claimant underwent anterior cervical fusion. Thus we conclude that claimant's compensable injury has worsened requiring surgery. Furthermore, as previously noted, we find that claimant was in the work force at the time of his disability. Accordingly, we authorize the reopening of claimant's 1989 injury claim to provide temporary disability compensation beginning March 8, 1998 , the date claimant was hospitalized. When claimant is medically stationary, the insurer shall close the claim pursuant to OAR 438-012-0055."

Thus, C5-6 is an issue in my life and in this case and the Board has already found that "C5-6 was causally related to the November 1989 compensable injury"(exhibit 25). There is no sane reason why the C5-6 injury and compensation for it should not be addressed by the Board now, when it clearly is related to the second injury, and the harms from that second injury are, to some extent, "medical sequelae" of the first injury, and when the medical problems have worsened after this injury was "accepted" by Liberty.

For justice to be rendered to me, the Board should have addressed not just C4-5 (and its injury and surgery) but also C5-6 (and its injury and surgery).

F. The Workers Compensation Board mistakenly failed to address ALJ Ogawa's failure to assess the

evidence of harassment and pressuring of my doctors, loss of evidence, by Liberty Northwest;

Lost evidence

1. When I was injured at Georgie's Beachside Grill (the second injury), Liberty's investigator picked up the video tape of the event. It has not been seen since, though I have asked for a copy of the tape of the investigative interview between me and him. Unfortunately I do not have a paper record of that.
2. There should be a letter from Samaritan Pacific Communities Hospital already in evidence discussing a number of missing MRIs. I made the mistake of innocently turning over to Liberty the MRIs in the hope and expectation the insurer would use them to arrive at a fair and just conclusion as to my case. Evidently, the transfer of possession of such MRIs to the insurer is normal " which makes sense, otherwise how could it make its own assessment of the disability? But it only makes sense if the insurer is not going to lose the MRIs. Liberty lost and never found those MRIs. But the MRI technician at the MRI imaging trailer at Samaritan Pacific Communities Hospital had retained copies in his system and was able to regenerate them for me. They are in evidence. Why did Liberty lose them? And isn't it a general rule of law that when a party loses or destroys evidence it is taken that the evidence supported the arguments of the other side?

As evidence of the loss of the MRIs, I note a letter regarding my Neurosurgical History and Physical, by Dr. Hacker, dated Nov. 12, 1997 . (EXHIBIT 26) "A review of outside films confirms degenerative changes, most pronounced at the C4-5 and C5-6 level. There is nothing to suggest an obvious deformity or subluxation. The patient has an MRI report that is several years old, documenting spondylotic change at C4-5 and C5-6. These studies apparently have been lost." I turned them over the Liberty , as is normal procedure; it wasn't me that lost them.

There is the January 17, 2003 letter from my then-attorney Brian Welch (EXHIBIT 27) to attorney McAllister for Liberty , "I would appreciate your kindness in locating those x-rays and forwarding them to Dr. Hacker." To the best of my knowledge, Dr.

Hacker never got them.

Liberty Bad faith

There is so much mishandling of the evidence, so many false assertions, so much skewed evidence that, in some instances individually, and together as a whole, they must indicate bad faith or worse. Because of the volume of this, I will (to make it easier for you to follow and me to present) break it down into groups of years.

The 1990s

There is the note (EXHIBIT 33) from an unidentified party that is undated, as it appears to be only one part of a larger document, but which refers to an incident which apparently occurred the next month . It could be from my then attorney at Bishop Strooband, as it came as part of a page entitled Notes for Reconsideration. It states

“On 2/11/91, Dr. Bernstein was apparently worn down by Liberty Northwest’s harassment and responded to a phone call from the claims examiner by saying “I believe that he is currently medically stationary,” but he continued that he also believed that (Edward Johnston) will need three times a week physical therapy for the next three months in order to maintain this. This coerced and qualified statement does not even come close to a medically stationary finding, despite the use of the “magic” words. On April 10, 1991 , Dr. Bernstein referred Edward Johnston for evaluation and possible entry into the Oregon Pain Center . Edward Johnston is obviously not medically stationary.”

The “magic words” which Liberty harassed my doctor to try to elicit were, of course, “medically stationary.” Liberty was not trying to determine or assess actual medical facts; it was trying to achieve a pre-set goal and justify a pre-determined conclusion.

On May 6, 1991 , in a letter (EXHIBIT 34) to Liberty’s Linda Hepp, Dr. William Bernstein noted I was “worsening” as a matter of his “objective findings,” thereby reversing his unhappy declaration of the “medically stationary” tooth that Liberty had pulled from him three months earlier.

On July 9, 1990 there was a Medical Arbiter Report by BBV (two doctors, Dr. Thad Stanford, orthopedic surgeon, and Dr. Berle Barth, a neurologist) (see previous exhibit 14), somewhat more than a year after my First Injury. In it, the problems that would grow worse had begun to manifest, and the medical report was a mixed one. It found a closed head injury, and "moderate cervical strain, upper cervical area". The doctors wrote "we do not feel this man is able to pursue employment as a doorman/bouncer." Estimate of resuming employment is difficult. We would guess three months. We would expect that this man will recover from these injuries and have no restrictions. His current problems are primarily due to his November 4, 1989 injury though he probably did not do it any good when he was injured again, in April of 1990. It does not appear that his condition is stationary at this point. We feel that the neurological base has to be touched.

Despite the conclusion the two doctors made about my not being able to resume my regular employment, On 5/5/92, the Appellate Unit Worksheet states that Dr Thad Stanford found no objective bases of impairment. (EXHIBIT 35) This Worksheet presented a one-sided representation of a complex and nuanced set of conclusions that Dr. Stanford and Dr. Berle Barth had made.. But it nonetheless led to a May 7, 1992 ORDER ON RECONSIDERATION: Claimant requested reconsideration. Partial disability is reduced to NONE. (EXHIBIT 36) On the basis of a subtle misrepresentation about Dr. Stanford's report, I was demoted to zero disability.

That was changed, in the OPINION AND ORDER dated August 26, 1992, (EXHIBIT 37) which assigned me a 15% disability for unscheduled neck and left shoulder permanent partial disability. It noted that the award was reduced to zero by Order on Reconsideration dated May 7, 1992 on a finding of no impairment by Dr. Stanford the appointed medical arbiter. Dr. Stanford should not have been appointed medical arbiter since he was previously involved with this case as an agent of a party "i.e., as an insurance company consultant. By Referee D. W. Daughtry (underline added.)

Also, there is Dr. Cephus Allin's brief February 9, 1998 cover letter (EXHIBIT 38) to Liberty, which

evidently went with a large volume of papers to Liberty . For that cover letter, Dr. Allin wrote only: "Ms. Jones, 384 pages. Go to hell." That was the point after which Dr. Allin refused to see me any more, because of the harassment he was suffering from the insurer.

On February 21, 1998 , my surgeon Dr Hacker wrote (EXHIBIT 39), evidently in some frustration, to Liberty (page 2) that "The patient's present condition is due to a cervical disc herniation, as mentioned above. It is not related to a cervical strain. Cervical spondylosis and foraminal narrowing may indeed be superimposed upon his condition." The evident frustration rings through; the doctor was getting tired of having Liberty press for an inappropriate or untrue diagnosis.

The letter from Liberty Hacker responded to is not in the record but is evidently dated 2/6/98 , as per the Hacker letter. It evidently asked for answers to a series of questions, as the Hacker response is organized that way. The Hacker letter makes it clear the Liberty letter must have been manipulative and misleading. Hacker replied by numbered paragraphs, presumably in response to numbered questions from Liberty . 1. "my examination is different now in the sense that his MRI scan documents a large deformity with disc protrusion at the left C5-6 level with compression of the nerve root and spinal cord. Also, the patient has evidence of diminished biceps strength on his left side." 2. "Yes. Be so advised." 3. "Is this a question?" 4. "To characterize the nature of this accident as "neck strain," in my opinion, is probably incorrect. On the other hand, I expect that cervical spine injury with the episode described has resulted in an osteophyte formation and disc hernia. ... my MRI findings, as well as Dr. Holmes' report are continued within your medical record file." 6. "The patient's present condition is due to a cervical disc herniation, as mentioned above. It is not related to a cervical strain. Cervical spondylosis and foraminal narrowing may indeed be superimposed upon this condition."

It is evident this doctor was being pressured by Liberty .

There is also a note by Dr. Hacker dated 7/27/98 (EXHIBIT 41), where Hacker wrote that, after talking

with an attorney – the fact that the patient found the onset of his symptoms with the injury described would point to the injury as being the major contributing cause of his disk herniation and need for surgical treatment. The logic should be obvious; so, too, should the reality that Dr. Hacker – like Dr. Bernstein, and Dr. Allin – was responding to assertions by Liberty and to pressure from Liberty to adopt those misdiagnoses and give them cover of medical legitimacy.

2000 (no relevant papers), 2001, early/mid 2002,

1. On October 10, 2001, Richard Arbeene, an IME, examined me. He ordered no diagnostic imaging (X-rays or MRIs), and had none available, he wrote. (EXHIBIT 42) Nonetheless, he found work-related strain only and predicted they would resolve within a period of six to eight weeks. The strain, was a result, he wrote, of the 7/28/01 injury, and he concluded that it produced the strains, and no more. Other doctors would disagree strongly with that. He also felt there was some pre-existing condition, of which he wrote – We are dealing with subjective complaints in this type of care. This, of course, was not so. Whichever injury he was referring to – it is not clear – as strains – I ended up with operations for both. Nonetheless, he predicted, as noted above, that I would be okay in 6 to 8 weeks. So much for Dr. Arbene. Nonetheless, Liberty rested its opposition to doing its duty to me as an insured injured worker, on the basis of this medical examination of the spine done without benefit of prior or a new MRI or x-ray.

There is a 11/26/01 Hacker document entitled: – Current Complaint – (EXHIBIT 43) that followed my Second Injury of July 28, 2001 and preceded my Second Surgery, for C4-5, by 4 months. It states – A review of his MRI scan confirms spinal cord compression and a disc herniation at the C4-5 level with previous cervical fusion at C5-6. Cervical myelopathy due to disc hernia, C4-5.

About two weeks later (12/7/2001), we have a faxed memo from Liberty apparently to Liberty (– To: Alice –). (EXHIBIT 44) – We only accepted an acute cervical and lumbar strain. These are not surgical conditions and therefore we are not authorizing the surgery for a cervical disc. This is dated 12/7/2001 . So, when facts meet insurer opinion, insurer will not change opinion. In three months I would be operated on, and

the basis and cause for that operation were already evident at the time of Liberty's internal memo.

On 2/27/02 Dr. Greg Bear did a MRI of my lumbar spine (note, not neck). Dr. Bear found (EXHIBIT 45): "There is mild disc space narrowing from L3-4 through L5-S1; these discs also demonstrate decreased signal intensity consistent with desiccation. There is somewhat prominent lumbosacral lordosis. L3-4 mild broad-based posterior disc bulge, resulting in mild stenosis of the spinal canal. There is mild encroachment on both neural foramina, but no evident impingement upon the existing nerve roots. L4-5, there is a broad-based posterior disc bulge/osteocyte, resulting in minimal stenosis of the spinal canal. The disc bulge is slightly more pronounced posterolaterally to the right. There are mild hypertrophic changes in the facets. These factors combine to result in encroachment upon the right neural foramen. There is mild partial effacement of the perineural fat planes associated with the existing portion of the right L4 nerve root."

In short, the damage from the two injuries was spreading, and was now clearly present in my lumbar spine, as well as neck. Meanwhile, on another planet, Liberty was still denying I had any problem other than "strain."

On March 18, 2002, in a letter to Dr. Theuson (EXHIBIT 46), Liberty assumes facts not agreed to by the doctor or patient, writing, "It was later determined that Mr. Johnston had some disc problems, but that these were degenerative in nature and unrelated to his work injury." No such determination was ever made, of course, except by a doctor who did a spinal exam without benefit of X-rays or MRIS. But having slipped this misrepresentation into the letter, Liberty then asked my doctor "Do you agree that his acute cervical/lumbar strain resolved and is medically stationary?" There is, without the doctor answering in some detail, no way the doctor can fail to do what Liberty wants, since the key finding "that there was just a 'strain'" is taken as a given, and the question the doctor is asked to answer assumes that there is strain present and nothing more. Dr. Theuson did not buy into Liberty's game. In reply he wrote, by hand, "As of 10/23/01 MRI my Rx changed from strain to herniated discs C4-5 level & (unclear) due to this injury."

The next question Liberty had asked of him also is of the "have you stopped beating your wife?" kind. It asked, "Do you agree that with regards to his accepted strain only he could do his regular work?" This again assumes that there is only a strain, because it is the only "accepted" condition (accepted, of course, by Liberty) " which assumption was false. Dr. Theuson replied to this question, too, in handwriting, "He worked up until the time of his surgery & cannot work now until recovered." The doctor was being reasonable and also a bit curt, evidence of his frustration with Liberty . And Liberty 's basis for doing all this was the IME report by a doctor who thought it proper to do a cervical/spinal exam without benefit of x-ray or MRI!

The next item is EXHIBIT 47. On 5/2/2002: Liberty wrote to me "we find that your work injury/activity is not the major cause of your C4-5 cervical disc herniation." They didn't say what was. On the very same day, 5/2/2002 , the state Occupational Safety and Health Administration issued a "Citation and Notification of Penalty" to Georgies. "The floor area between the dishwashing department and the grill work area, in the kitchen, becomes slick when water from the dishwashing department is tracked or spilled and grease from the grill area is tracked on to the wet floor." OSHA got it, and fined Georgies for allowing the continuation of a hazardous condition that had created my Second Injury. Liberty didn't get it " or pretended not to " and was still manning the fort of a hypothetical and minimal "strain."

3. There followed a series of medical reports indicating various medical problems. On 8/16/02, a Diagnostic Imaging Report, (EXHIBIT 48) from Samaritan Pacific Communities Hospital, regarding 4 views of my cervical spine, found "generalized straightening of the cervical curvature | There (are) inferior plate screws inset at the inferior aspect of the C5-6 disk space, and the disk space appears to be ossified. There are moderate degenerative changes at C6-7. | The immediate prevertebral soft tissues are abnormally thickened at the C3 level."

On 9/23/02 in another report (EXHIBIT 49), Dr. Hacker found the patient "continues to have symptoms consistent with myelopathy, with electric shocks which will radiate into his arms and won into his legs. He

tells me these symptoms do not seem to have changed much.â€

A report on a 10/09/2002 MRI of my cervical spine by Dr. Larry Wampler (EXHIBIT 50) found: â€œC3-4 level reveals mild disk bulging with no focal or discrete herniation and no significant canal or foraminal narrowing. C4-5 and C5-6 levels reveal interbody fusions. â€ No significant canal or foraminal stenosis identified. There appears to be a mild disc bulge at C6-7 with no significant canal or foraminal narrowing. Mild left foraminal narrowing is noted.â€

Late 2002, 2003 and 2004

The plot thickens a bit more with a 10/29/2002 letter to attorney Liberty McAllister, answering questions (EXHIBIT 51). The letter is written by Dr Paul Munier, who had done some x-rays of me. â€œThere is some disc space narrowing at C4-5 and early posterior osteophytic ridging at the same level. There is a small linear calcification anterior to the C4-5 disc level which appears to be ligamentous in origin. â€ this entire series of examinations are not appreciable changed. The MRI examinations likewise reveal stable findings at the C4-5 level. The findings on MRI correspond with the findings on plain filmâ€ There is vertebral body endplate spondylosis or hypertrophic degenerative change. The intervertebral disc has a corresponding protrusion which is central to left paracentral. There is some compromise of the central canal and apparent displacement of the traversing cervical cord at this level. â€ the examinations are not appreciably or objectively changed between 12/12/97 and 10/23/2001 .â€Meunier finds an extruded disc fragment, and explains that the difference between this and a disc herniation is â€œa semantic difference that really has no importance in this situationâ€â€He believes the hernia pre-existed the slip and fall incident of 2001. He does not say why.

There are a number of points to note here. One is the numerous, widespread, cervical problems at C4-5, upon which I did not get â€œ could not get â€œ surgery till 3/5/02 . Another is the disconnect between the flippant conclusion of no change and the identified problems:

- disc space narrowing at C4-5 and

- early posterior osteophytic ridging at the same level;
- small linear calcification anterior to the C4-5 disc level;
- vertebral body endplate spondylosis or hypertrophic degenerative change
- the intervertebral disc has a corresponding protrusion which is central to left paracentral.;
- some compromise of the central canal and apparent displacement of the traversing cervical cord at this level;

This is the picture of a badly deteriorating central cervical spine. If there is little deterioration from the exam cited of 10/23/2001 , it is almost certainly false to say there is little deterioration from 12/12/97 , four years earlier.

Compare, for instance to the October 10, 2001 , Richard Arbene, IME report, or, for a view from the other side, compare to the 11/26/01 Hacker document entitled: "Current Complaint" (EXHIBIT 43) that preceded my Second Surgery.

I had gotten worse. My neck was, by this time, suffering numerous and serious medical ailments, all of them are traceable to the two injuries.

Here we have a second supposedly independent Medical Examiner making unsupportable conclusions (the first was Arbenene, who reached his conclusions without any X-Rays or MRIs.) Dr. Munier may have been saying what Liberty wanted to hear " an Independent Medical Examiner, if he says otherwise may stop getting selected from the WC Board's list of six choices it sends to the insurer - but, at least he is not saying there is only "strain."

In a letter dated 2/11/2003 , from Dr. Hacker to Liberty lawyer Jacqueline Jacobson, (EXHIBIT 52), Dr. Hackers disagreed with Munier. This must be quoted at some length:

"I have read your attached report authored by Dr.

Munier dated 10/29/2002 . I find myself in disagreement with Dr. Munier's report. Dr. Munier tells us that Mr. Johnston's MRI scans from 1997 and 2001 are essentially the same. This is not accurate and is not supported by my interpretation as well. Dr. Hall, the radiologist who read Mr. Johnston's 12/12/1997 MRI described the C4-5 level as follows: "Smaller, midline left abnormality at C4-5, probably representing cervical spondylosis rather than disc herniation." Dr. Wampler described the abnormality at the C4-5 level identified on the October 2001 scan as follows: "Broad-based disc protrusion, C4-5, which is biased slightly to the left and compresses the cord along its ventral surface. The AP diameter of the canal is reduced approximately 7 mm at this level and the AP diameter of the disc protrusion is estimated to be approximately 4 mm." In my chart review, I described the patient's MRI scan as showing spinal cord compression and a disc herniation at the C4-5 level on 11/26/2001. This is in comparison to my description dated 12/22/1997 in which I said: "The MRI scan is reviewed, documenting a large osteophytic deformity with perhaps associated disc protrusion at the left C5-6 level compressing the nerve root and spinal cord on the left side. At the C4-5 level, there is a small lesion which appears to be an asymptomatic cervical disc protrusion." In any event, it appears that both radiologists and myself have a different opinion than Dr. Munier in regard to the significance of the disc herniation and the significance of the disc herniation and its size. I do not find myself able to agree with this characterization , as it appears quite incorrect, based on my own as well as the other two doctors' interpretation.

My conclusion is that we have had two (Arbeene and now Munier) biased IMEs, or two IMEs who were pressured, like some of my own doctors, to reach certain conclusions.

/

Shortly thereafter, on 2/25/2003, my then attorney Welch wrote Liberty (EXHIBIT 53) requesting Liberty accept herniated disc C4-5 as directly caused by injury of Nov 4, 1989 or as having developed as consequence thereof. I don't have an earlier response from Liberty , but Liberty , in a letter to the WCB's Own Motion Unit (dated 6/13/2003) (EXHIBIT 57) declined to do so.

I had been operated on a year earlier for C4-5 on 3/4/02 . Apparently, Liberty believed the operation “the second one, on top of a first which was risky enough” was unnecessary, and by extension, that my surgeon was unnecessarily risking my life, or paralysis, for no good reason.

On 2/26/2003 I wrote to my then attorney Welch (EXHIBIT 54) saying the evidence shows C4-5 was herniated, as of the Nov. 4, 1989 injury and became compressed July 28, 2001 from that date injury. Welch replied on March 19, 2003 (EXHIBIT 55) that there are benefits available to me on “LIFETIME BASIS, including medical care and treatment related to the accepted condition.” If this is legally so, why haven’t I seen anything like it?

The reality of spreading, serious, medical deterioration is furthered by the 3/20/2003 MRI by Dr. Greg Bear of my spine (as opposed to neck). (EXHIBIT 56) Its Findings include “Mild degenerative disk disease from L3-4 through L5-S1; Minor posterior disk bulges/osteophytes at L3-4 and L4-5; consequent compromise at the neural foramina at L4-5, more pronounced on the right. There may be impingement upon the existing portion of the right L4 nerve root.” My problems were spreading further.

After I had sought further review, Liberty, in a letter to the WCB’s Own Motion Unit (as noted above) (dated 6/13/2003) (EXHIBIT 57) asserted “our position is that this motion to accept C4-5 as a accepted condition is actually a new, but unrelated condition, and therefore, continue to recommend denial of reopening for Own Motion benefits.” By this time, C4-5 had gotten bad enough to require the 3/3/02 operation. Liberty was looking for a legalistic way to evade its obligations.

2005

1. There is also implicit evidence of harassment in the record from Dr. Gary Theuson where he wrote, on 03/04/05, upon and in response to a “Rush Please” note from Liberty’s Theresa Tracy (EXHIBIT 59). He was in evident frustration with Liberty’s agent putting words in his mouth. He wrote that he (Dr. Theuson) did not concur with the claim from Liberty that I was able to go back to work at Georgies

effective January 1, 2003 . In reply to the familiarly misleading question that followed "If no, when" the doctor handwrote a blunt answer: "I don't think he can return to any vigorous demand job with cervical myelopathy."

Here, the frustration is again evident. Once again, Liberty was seeking to lead or mislead the physician, and once again, Liberty was assuming facts not agreed to by the physician. In this instance it was the assumption I could go back to the kind of work that I had done, and that paid me best, the "vigorous" physical work of being a bouncer (or, perhaps, as a short-order cook, which was also too demanding and too risky for me to think it wise medically to do, either.)

On 10/05/05 , in another, similar transmittal, (EXHIBIT 60) Liberty's Theresa Tracey requested that Dr. Theuson concur with Liberty's claim that I was medically stationary on 12-16-02 .

This was asking Theuson to roll the clock back nearly three years.

In response, Theuson wrote by hand (excluding the unclear/unreadable handwriting), "12/02 was a guess; 7/1/03 IME eval 4/22/05 & my agreement he was medically stationary was dated May 5, 2005 ."

If I was not medically stationary till May 2005, where are my time loss payments for 2002, 2003, 2004 and the first half of 2005 - and my medication costs for all that time?

On 2/4/05 Liberty finally, in a STIPULATION, accepted the C4-5 herniation as an accepted condition. (EXHIBIT 61) This was nearly three years after the surgery at that site. The taxpayers paid for it, I guess, because I didn't and Liberty didn't.

I had two MRIs done on 3/30/2005 by Dr. Bear, one on my cervical region, one on lumbar. The Diagnostic Imaging Report, signed 4/06/05 by Dr. Bear, reported that the cervical spine (EXHIBIT 62) MRI found: "Multi-level fusion; Posterior disk bulges/osteophytes at most cervical levels (C3-4, C4-5, C5-6, C6-7) more pronounced to left of midline. There is resultant mild to moderate stenosis. There is also encroachment on numerous neural foramina, most severe on the left at

C6-7. Correlate with clinical evidence of compression of the left C7 nerve root. There may also be impingement of the left C4 through C6 nerve roots.

This is now a group of really serious medical problems.

The Diagnostic Imaging Rpt, on the lumbar spine MRI (EXHIBIT 63), reported: T12-L1, mild posterior disk bulge/osteophyte, with mild spinal stenosis. L3-4, mild broad-based posterior disk bulge/osteophyte with mild spinal stenosis. Nerve root exists freely. L3 nerve exists without impingement. L4-5 mild posterior disk bulge/osteophyte. No significant compromise at the spinal canal. There is mild encroachment on the neural foramina, without definite root impingement. L5-S1, degenerative changes in the facet joints.

In short, I was getting even worse “ and in my back as well as cervical spine.

I received Liberty’s Notice of Closure dated 6/15/05 (EXHIBIT 68). It asserted I became medically stationary 12/16/02 and my aggravating rights would end 7/28/06 . By pushing back my medically stationary date way beyond what my doctor had actually identified as this, Liberty was able to end my aggravation rights period sooner.

On July 25, 2005, (EXHIBIT 71) to make things worse, in its Insurer Notice of Closure Summary, Liberty identified me as a “Return to work type” that could not return to “job at injury” or to “job at aggravation” and indeed, checked the box “No Job.” This, despite its consistent earlier assertions that I could go back to work, could do anything I could ever have done, and could do them in various capacities and in ways that my own doctor consistently said were unsafe to me. All of a sudden, now I can’t do anything. Which is perhaps closer to the truth, but still not the truth.

I am not yet in a wheelchair or bed-ridden. Not yet. With the claim I can take “No Job,” Liberty has made me, for all practical purposes, unemployable and uninsurable (and, as uninsurable, doubly unemployable) “ even while still refusing to cover the great majority of my medical ailments, needs and costs. This was vicious and deceitful and complex.

There was more to come: I received a Notice of Postponement of Reconsideration, dated 10/14/05 . (EXHIBIT 72) The WC office was sending it to a medical arbiter for review. With it was a list of six doctors to choose from. Shortly thereafter, there was a choice, by Liberty , of one Dr. Throop, and a No Conflict of Interest letter signed by Dr Throop and dated 10/24/05 . "This examination is only for the newly accepted condition of C4-5 disc herniation." Three years after I had had an operation for this condition, Liberty and the WC Division wanted a medical exam to see if I had a problem at C4-5.

Dr. Throop's medical exam report, dated 11/15/05 , was four pages long. It was a whopper. (EXHIBIT 9) "There is no evidence of peripheral nerve or nerve root malfunction," he wrote, contrary, to virtually everything that had gone before. Also, "there is no limitation to repetitive use of the cervical spine." And, he wrote, "The only abnormal finding is a decreased range of motion and this is due to his severe diffuse degenerative disease of the cervical spine at a 94% level. The degenerative disease is unrelated to the C4-5 disk herniation. The worker had surgery at one of these levels for this condition and 50% of the problem at this level (C4-5) was due to degenerative disease, hence the calculated percentage." He said I can "Occasionally carry 50 pounds, frequently 35, constantly 25" and "sit, stand, and walk eight hours. There is no preclusion from any of the activities listed. But Throop's work included a brief, one page cervical range of motion study, and addressed only C4-5. That was not his fault; an administrative rule or ORS (see page 1 of his statement) restricted him to it, even though my neck vertebra are connected (albeit with a metal plate in a couple places).

If one ignores or discounts the most severe of my accepted medical problems and ignores the great majority of my total list of problems one can achieve almost any desired conclusion. And that is what Throop did.

For a perspective on how wrong he was, please review the spreadsheet "Ed's Medical History" which gives a timeline showing when each new medical problem was first diagnosed.

Throop's bizarre report led to an ORDER ON

RECONSIDERATION, by ALJ Ogawa, on 11/28/05 , in reviewing the "newly accepted condition of C4-5 herniation" (by then several years old, and identified as such for several years). She would, Ogawa wrote, use the Throop report, because she found it "thorough and persuasive." With that, she cut the payment to me to \$5,875 and my disability to a mere 12 percent disability, down from 42%. (itself down from 46%). As I argued in papers to the WC Board and ALJ Ogawa "Please see my EXHIBIT 73 - the report blatantly contradicted the great majority of what had gone before it, was absurd on the face of it, and based on a brief and inadequate medical exam by Throop.

G. The Workers Compensation Board mistakenly failed to overturn ALJ Ogawa's decision not to award me compensation and increased disability percentage, as a permanent disability as appropriate for my harms and losses, my loss of employment, and my medical expenses.

Given all the above facts, cites and arguments, it should be clear the WC Board could have reasonably reviewed the record and concluded that Ogawa erred in assigning me an 8 percent disability and chosen one more close to the facts, which are, by the evidence, that I am totally or nearly totally disabled, cannot work ever again in my most lucrative employment as a bouncer, nor risk employment as a cook anymore; that my disability is permanent and worsening, and that the WC Board should order Liberty to make an appropriate compensation to me for monies not paid due to the above misbehaviors, money that should have been paid for lost employment, medical costs and expenses, and to the degree permitted, pain and suffering, which has been very great.

BASED ON THE ASSIGNMENTS OF ERROR, I THEREFORE MAKE THE FOLLOWING PLEA FOR REMEDY AND RELIEF : I SEEK AN ORDER OF THIS COURT TO THE EFFECT THAT THE WORKERS COMPENSATION BOARD

A. mistakenly failed to overturn Ogawa's finding of "no spinal stenosis" in my case;

B. mistakenly failed to overturn Ogawa's finding that no relevant physician had found me not medically stationary or worse;

C. mistakenly failed to address the "closed

head injuryâ€œin my case;

D. mistakenly failed to overturn ALJ Ogawas decision, which it should have overturned on grounds I am totally or near totally disabled due to my initial, continuing, expanding and worsening medical conditions;

E. mistakenly failed to overturn Administrative Law Judge Ogawas mistaken refusal to address my first, as well as my second injury;

F. mistakenly failed to address ALJ Ogawas failure to assess the evidence of harassment and pressuring of my doctors, loss of evidence, by Liberty Northwest;

G. And mistakenly failed to overturn ALJ Ogawas decision not to award me compensation and increased disability percentage, as a permanent disability as appropriate for my harms and losses, my loss of employment, and my medical expenses.

In addition, if it is permitted, I request an Order to the Workers Compensation Board

1. for it to pay me \$10 million for lost wages and employment, pain and suffering, medial and pharmaceutical costs expended, and emotional and psychological pain and suffering;

2. for it to Order Liberty Northwest Insurance to pay me \$10 million for lost wages and employment, pain and suffering, medical and pharmaceutical costs expended, and emotional and psychological pain and suffering;

3. and for it to Order Liberty Northwest to pay me an additional punitive damages of \$15 million for losing or destroying evidence, conspiracy to mis-identify and deny my disability, fraud, conspiracy and insurance fraud.

Respectfully Submitted by Edward M. Johnston.

Signed: _____ dated:

Edward M. Johnston

NOTARIZATION:

In The State of Oregon)

)

In the County of _____)

The foregoing was signed and sworn to before me
personally by Edward Johnston on this

_____ day of December, 2006;

Notary Seal:

I am a Notary Public of the state of Oregon ; my
commission expires _____.

#####

Certificate of mailing follows:

I, EDWARD M. JOHNSTON, do hereby swear and state that
I have placed a copy of this COMPLAINT into the US
mail to the following:

Workers Compensation Department

State of Oregon

Attn: Mr. John Schiltz, Director

Liberty NW Insurance

POB 4400

Portland , OR 97208

Anderson & Nyberg,

POB 4400

Portland , OR 97208

Georgies Beachside Grill

Newport , Oregon

Insured party and owner of the site of the first

injury

Hallmark Resorts,

15455 Hallmark Drive, Ste 200,

Lake Oswego, OR 97035

I am not sending them copies of the evidence. They
have it all.

Signed:

dated _____

Edward M. Johnston
