

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF TEXAS
MARSHALL DIVISION

ROBERT YOST,

Plaintiff,

v.

Case No.: 2:03-CV-268(TJW)
Judge T. John Ward

CONTINENTAL CASUALTY COMPANY,

Defendant.

_____ /

**PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT & BRIEF IN SUPPORT
THEREOF AND PLAINTIFF'S RESPONSE TO DEFENDANT'S BRIEF IN
SUPPORT OF SUMMARY JUDGMENT**

PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

Plaintiff, Robert Yost, through his undersigned counsel and pursuant to Rule 56(b) of the Federal Rules of Civil Procedure, moves for the entry of an Order granting summary judgment in his favor and against the Defendant, Continental Casualty Company ("CCC") and as grounds states:

1. Plaintiff sued Defendant for the wrongful termination of disability insurance benefits pursuant to a group long-term disability plan governed by the Employee Retirement Security Income Act, 29 U.S.C § 1001. et seq. (ERISA).
2. CCC in terminating Mr. Yost's benefits was operating under an inherent and actual conflict of interest, reflected by its breach of fiduciary duties, and therefore the Defendant is deserving of less deference than a Court would uphold in a straight arbitrary and capricious standard of review.

3. The Defendant's decision to terminate Mr. Yost's benefits cannot be upheld even under the most deferential arbitrary and capricious standard of review.

4. Summary Judgment is proper in any case where there is no genuine issue of material fact. Fed.R.Civ.P. Rule 56 (c). A Plaintiff moving for summary judgment may satisfy its burden by submitting summary judgment proof that establishes all elements of its cause of action as a matter of law.

5. Summary judgment should be granted in this case because there are no genuine issues of material fact concerning Defendant's arbitrary and capricious termination of Robert Yost's benefits: this Motion, accompanying Memorandum of Law including a Statement of Undisputed Material Facts, and Defendant's administrative record as submitted to the Plaintiff via additional disclosures pursuant to this Court's discovery Order, establish there is no genuine issue of material fact.

WHEREFORE, Plaintiff, Robert Yost, respectfully requests that this Court grant this Motion and render an Order granting Summary Judgment in his favor and against the Defendant, CCC, and for such other and further relief as this Court deems just and proper.

**PLAINTIFF'S RESPONSE TO DEFENDANT'S MOTION FOR
SUMMARY JUDGMENT**

The Plaintiff, Robert Yost, hereby responds to Continental Casualty Company's Motion for Summary Judgment and Brief in Support Thereof pursuant to Rule 56(b) of the Federal Rules of Civil Procedure and Local Rule CV-7 (d) and states in support the following Brief.

**PLAINTIFF’S BRIEF IN SUPPORT OF SUMMARY JUDGMENT AND IN
RESPONSE TO DEFENDANT’S BRIEF IN SUPPORT OF
SUMMARY JUDGMENT**

I. Introduction

In November of 1998, Mr. Yost was stripped of his life by Meniere’s Disease¹. It began with the elimination of Mr. Yost’s administrative responsibilities at work, as he was no longer able to use a computer and/or a monitor due to dizziness, headaches and nausea. Mr. Yost ceased work completely in July of 1999, as almost any activity would trigger attacks of vertigo and dizziness and severely impair the ability to do his job.

To try and lessen the symptoms, in July of 1999 Mr. Yost underwent a left tympanectomy and left mastectomy with endolymphatic sac drainage² ordered by Dr. William Meyerhoff, M.D., Chair of Otolaryngology and Head and Neck Surgery at University of Texas, Southwestern Medical Center. The procedure did not result in any improvement³, revealed by the absence of changes in his ENG results. Accordingly, Dr.

¹ “Ménière’s disease is a chronic, incurable vestibular (inner ear) disorder defined as “the idiopathic syndrome of endolymphatic hydrops.” This means that Ménière’s disease, a form of [endolymphatic hydrops](#), produces a recurring set of symptoms as a result of abnormally large amounts of a fluid called endolymph collecting in the inner ear. . . **Oncoming attacks** are often preceded by an “aura,” or a certain set of warning symptoms including balance disturbance, dizziness, headache, increased ear pressure, hearing loss or tinnitus increase, sound sensitivity, and a vague feeling of uneasiness. . . **During an attack** of early stage Ménière’s disease, symptoms include spontaneous, violent vertigo; fluctuating hearing loss; and ear fullness (aural fullness) and/or tinnitus. Attacks can also include other symptoms in addition to these main symptoms. . . **The periods between attacks** are symptom free for some people and symptomatic for others. (Please refer to VEDA’s document #F4 for additional details about symptoms that have been reported concerning concentration, emotions, coordination, fatigue, vision, balance, and others.). . . **Late stage Ménière’s disease** refers to a set of symptoms rather than a point in time. Hearing loss is more significant and is less likely to fluctuate. Tinnitus and/or aural fullness may be stronger and more constant. Attacks of vertigo may be replaced by more constant struggles with vision and balance. Sometimes, drop attacks of vestibular origin (Tumarkin’s otolithic crisis) occur in this stage of Ménière’s disease.” www.vestibular.org/menieres.html

² Defendant’s administrative record for Mr. Yost as produced to Plaintiff via discovery and attached hereto as Exhibit 1 (hereinafter “Defendant’s A.R.”), (Tab 7) p.234-235.

³ See letter from Dr. Meyerhoff dated August 4, 1999, stating “had left. . . sac procedure. . . did extremely well until about a week ago. . . developed severe vertigo with nausea and significant vomiting and pressure in his right ear. . . at this time his hearing is down in both ears according to his audiogram. . . did not think

Meyerhoff ordered Titration Streptomycin Therapy performed by Howard S. Garb, M.D., ENT, who administered 20 injections. Still, there was no change in Mr. Yost's condition. Thus 18 more injections were administered, save the last two that Mr. Yost could endure throughout his lifetime, followed by again, no change in the Plaintiff's condition. Dr. Meyerhoff commented that he had never observed a case of Meniere's this severe. Dr. Meyerhoff performed the same surgery on Robert's right ear⁴, hoping to improve his condition. When the latter did not help, Robert Yost came to terms with the fact that he was going to have to live with Meniere's Disease and its unpredictable and brutal symptoms. However, he intended to make the best of it.

Robert Yost was not going to take his bleak prognosis lying down. He thought about how giving up would set a terrible example for his grandchildren. However, great changes in Mr. Yost's life were inevitable. Once an active part of his granddaughter's life; he was now not permitted to be alone with her since he could have an attack of vertigo at any moment. Once an avid supporter of his grandchildren's hobbies, he could now not go to their ballgames due to the noise. He could not go shopping with his wife at WalMart. Once very independent, he could not now drive any kind of distance alone. However, when Robert felt good, he'd do everything he could even in the knowledge that he may hurt himself, as long as no one was depending upon him. He will drive 4 miles from home and he will try and work on his car until he starts spinning. Such a willingness to do the latter does not equate to the ability to perform a job on a regular and consistent basis; it does not make Mr. Yost dependable.

it was an autoimmune inner ear problem. . . I am less convinced at this time. . . have put Mr. Yost on tapering doses of steroids," as well as his letter of August 30, 1999, stating, "He continues to have bad spells of vertigo. . . he has not been a steroid responder and he has a negative 68kD" Defendant's A.R., (Tab 7) p. 231-232.

⁴ Defendant's A.R., (Tab 7) p. 228-229.

Surveillance conducted by the Defendant revealed Robert Yost driving 4 miles from his house, fixing a car door and even carrying furniture. None of these activities are inconsistent with the restrictions and limitations of Dr. Meyerhoff, who restricted his patient, before and after viewing the surveillance report, from doing anything involving noise or complex visual cues such as using a monitor or driving in traffic; the Defendant's own medical reviewer, that noted that Robert would have to be excused from all work duties if he was experiencing an attack of Meniere's and that absences from work would be expected; or the Defendant's own Labor Market Survey that concluded that Robert cannot be in a crowd or in any noise and must have only limited visual stimuli. The case law in this Circuit is clear: with nothing more, surveillance, even if inconsistent with a claimant's restrictions and limitations is not substantial evidence to support a termination of disability benefits under an arbitrary and capricious standard of review.

The Defendant accepted liability on Mr. Yost's claim, paid him for over 3 years, and then arbitrarily terminated his benefits in the face of his worsening condition. The definition in the policy never changed, and certainly the Plaintiff's condition did not improve.

II. Facts

Robert Yost ceased working for Goodyear Tire & Rubber Company due to Inner Ear Disease (Meniere's Disease, bilateral), severe vertigo, headaches, visual problems and hearing loss, in July of 1999. Continental Casualty Company ("CCC") deemed Mr. Yost disabled pursuant to its policy and paid him disability benefits for over three years until November of 2002. The Social Security Administration similarly deemed Mr. Yost

unable to perform any work since January of 2000 due to vertiginous syndromes and other disorders of vestibular system.⁵ CCC's own medical reviewer, John R. Wiley, in September of 2000, concluded, "Meniere's Disease confirmed with caloric/ENG tests. Has undergone bilateral mactoelectomies and endolymphatic sac drainage. Despite surgery and meds, clmt continues to have frequent attacks of vertigo w/ balance disturbance and tinnitus. He has had progressive but gradual hearing loss. **Alleged limitations are supported by medical evidence.**"⁶

The definition of disability in the subject policy does not change with the amount of time that passes once one becomes disabled, but from the inception of disability requires a claimant to be "continuously unable to engage in any occupation for which the Insured Employee is or becomes qualified by education, training or experience."⁷ Thus, since CCC initially paid Mr. Yost under such definition, something must change in the claimant's medical condition in order for CCC to properly terminate his benefits.

Yet such was not the reason for Defendant's termination of Mr. Yost's claim. The Defendant stated in its initial termination letter that Dr. William Meyerhoff, (Professor and Chairman, Holder of the Arthur E. Meyerhoff Chair in Otolaryngology, Head and Neck Surgery, University of Texas, Southwestern Medical Center), cleared Mr. Yost for alternative work on June 26, 2000 albeit with restrictions of *not being able to do anything associated with noise or complex visual cues.*⁸ Defendant itself noted in this letter that although a Labor Market Survey⁹ of July 2000 revealed numerous home based

⁵ Defendant's A.R., (Tab 5) p. 194

⁶ Defendant's A.R., (Tab 5) p. 169.

⁷ Defendant's A.R., CCC's Policy for Goodyear Tire & Rubber, (Tab 3) p. 21.

⁸ Defendant's A.R., (Tab 9) p. 264.

⁹ CCC's own Labor Market Survey specifically revealed that Mr. Yost was best suited to perform a job which is isolated with *no noise* and *limited visual stimuli* and concluded home employment would be best

jobs of gainful wage, it was demonstrated that Mr. Yost did not have the ability to perform gainful work in the open labor market and that Dr. Meyerhoff indicated that *computer type jobs*, even at home, would exacerbate his condition.¹⁰ Defendant also noted surveillance that was conducted in October of 2001 that revealed driving and lifting, loading and unloading furniture out of trailer and placing himself in delicate balance situation while doing so, bending, stooping and lifting. However, in November of 2001 when such surveillance information was forwarded to Dr. Meyerhoff, his recommendation regarding Mr. Yost's work ability remained exactly the same – that he could perform alternative occupations with restrictions of avoiding complex visual cues, later clarified as “visual signals that are complex such as monitors and traffic while driving, etc.” Regardless, CCC went on to list that feasible alternative occupations for Mr. Yost were that of administrative assistant, business unit manager, staffing coordinator and rental care agent.

Even CCC's **own medical reviewer**, Herb Wettreich, M.D., Board Certified in Otolaryngology, opined in March of 2003 that

The history, physical examination, and testing do support the diagnosis of the treating physician; however, the progression of symptoms cannot be accurately assessed. . . Based on the medical records, from an otolaryngologist perspective, Mr. Youst [sic] has impairment based on the medical evidence findings. The clinical findings that document Mr. Youst's diagnosis would be the abnormal ENG findings as well as audiometric findings. . . Mr. Youst [sic] would be able to perform a low physical demand occupation with sit/stand options and minimal lifting of 10 pounds as of November 14, 2002 *providing he would have the ability*

for him since Meniere's sometimes renders him immobile and he becomes ill from being in crowds or subjected to noise. The report also noted that Mr. Yost was extremely motivated to locate a job that would get him back into the work force. Defendant's A.R., (Tab 5) p. 169-172.

¹⁰ In October of 2000, Defendant's claim file reveals a VCM review that looked at new information from Myerhoff in response to the idea of Yost performing home based jobs. Myerhoff's letter stated that the computer type jobs, even though home based, would exacerbate the employee's symptoms and that he did not feel he could fulfill the responsibilities. Defendant's A.R., (Tab 7) p. 226. The VCW review concluded, “**Therefore it has been determined that the EE will not be able to perform gainful work.**” Defendant's A.R., (Tab 11) p. 363.

*to sit down and be excused from all work duties if he was experiencing an attack of Meniere's Disease. During an acute episode of vertigo, absences from work would be expected.”*¹¹

Such restriction does not allow one to secure employment in any capacity, whether the job involves a monitor or not. In practicality, no employer will hire or retain anyone who is excessively absent when they can easily hire an employee who possesses the same skills and will not have to miss work periodically. However, Mr. Yost's monitor-restriction is telling, as even selling movie tickets, the ever-famous “any occupation” example, requires working with a computer monitor in this day and age.

Thus it would seem that Defendant's only basis in terminating Mr. Yost's claim was its surveillance report. As Mr. Yost has *always*¹² reported, he has good days and bad days, and one good day is certainly not telling with regard to the Plaintiff's overall work capacity. Rather, Robert's medical records as well as CCC's various reviews clearly indicate that Robert Yost is unable to perform any activity with consistency and regularity and is thus is unable to rejoin the workforce.

III. Summary Judgment Standard and Argument

A moving party is entitled to summary judgment if the pleadings, affidavits and other supporting papers show there is no genuine issue of material fact and the movant is entitled to judgment as a matter of law. Fed. R.Civ.P., 56(c); Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986). The burden of establishing the absence of a genuine issue of material fact is on the party seeking summary judgment. Anderson v. Liberty, 477 U.S. 242 (1986). Once this burden has been met, the adverse party must show there remains a genuine issue for trial. Fed.R.Civ.P., 56(e).

¹¹ Defendant's A.R., (Tab 5) p. 145-148.

¹² i.e. such is not a *change* in his condition that would warrant termination of benefits.

When looking at the facts in the light most favorable to the Defendant, Mr. Yost is entitled to judgment in his favor as a matter of law, even if the applicable standard of review is arbitrary and capricious.¹³ Mr. Yost's restrictions and limitations do not allow him to perform any type of work on a regular and dependable basis, as it is undisputed that his debilitating symptoms are ongoing and will not improve. However, even if Robert was able to perform sedentary work, Mr. Yost is precluded from utilizing a computer or monitor, or any device requiring complex visual acuity and is thus prevented from performing any sedentary work in which he would be qualified based on his education, training or experience. As evident by internal claims analysis records, CCC construes the latter policy language to require a claimant to be able to perform *gainful* work. See Robert Cirnigliaro's October 18, 2000 entry, Defendant's A.R., (Tab 11) p. 363, discussed *supra*, and Vocational Assessment by Bob Cirnigliaro dated July 26, 2000, Defendant's A.R. 364 ("Per Dr. Meyerhoff fax dated 5/16/00: EE cannot do anything associated with noise or complex visual cues. . . Dr. Meyerhoff faxed the questionnaire back on July 6, 2000 and stated that the EE could perform light/sedentary work on a full-time basis, but with the above restrictions. . . However, at this point, the EE does not demonstrate the ability to perform *gainful* work in the open labor market.") Thus, even if Mr. Yost could perform some sedentary activity that did not necessitate the use of a computer such as bagger at a supermarket or even a seated security guard, such would not amount to gainful work, universally translated as 60% of pre-disability earnings, as can be gleaned from Mr. Yost's gross monthly disability income of \$2919.00, he made over \$60,000.00 per year.

¹³ The Plaintiff's position, discussed *infra*, is that the Court apply a sliding scale approach and reduce deference significantly due to CCC's conflict of interest.

Regardless, as discussed *infra*, it is quite evident from its complete administrative record that the Defendant's sole basis for termination of disability benefits was the surveillance video that Defendant opined revealed activity involving complex visual acuity and thus a contradiction of Dr. Meyerhoff's conclusions. Upholding the summary judgment standard, even if the surveillance activities were inconsistent with Mr. Yost's restrictions and limitations, which they are not, and suggested he could work with a computer or other device necessitating complex visual acuity and thus allowing gainful work, this Circuit does not tolerate terminations based on surveillance video alone even under an arbitrary a capricious standard of review, as discussed *infra*.

IV. ERISA Standard of Review

Factual determinations made by an administrator during the course of a benefits review are reviewed for an abuse of discretion. Meditrust Fin. Servs. Corp. v. Sterling Chems., Inc., 168 F.3d 211, 213 (5th Cir. 1999). Under an abuse of discretion or arbitrary and capricious standard of review, a plan administrator's decision will be affirmed if it is supported by "substantial evidence." Id. at 215. "Substantial evidence" is "more than a mere scintilla . . . it means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. Girling Health Care, Inc. v. Shalala, 85 F.3d 211, 215 (5th Cir. 1990) (citations omitted).

The Plaintiff will not address Defendant's erroneous contentions that the discretionary language in the Summary Plan Document is adequate to trigger an arbitrary and capricious standard of review since we are dealing with a factual dispute and the existence of such language is a non-issue. However, the standard of review is not a

straight arbitrary and capricious one due to both the inherent and actual conflict of interest that exists on the part of CCC.

A. CCC's Inherent Conflict of Interest

A self-interested insurer is one who serves as both the insurer and administrator of the plan and potentially benefits from every denied claim. Vega v. National Life Ins. Servs., 188 F.3d 287, 295 (5th Cir. 1999). *See also* Gooden v. Provident, 250 F.3d 329 (5th cir. 2001) (When the plan administrator is also the insurer, the administrative decision gets less deference and a sliding scale approach is applied since the administrator potentially benefits from every denied claim.) The Fifth Circuit applies a “sliding scale” approach when addressing potentially conflicted administrators, i.e. “the greater the evidence of a conflict on the part of the administrator, the less deferential [the] abuse of discretion standard will be.” Vega, 188 F.3d at 297. In the case at bar, CCC is both the claims administrator and insurer, i.e. makes the claim decisions and pays the benefits thereby creating an inherent conflict of interest as described herein.

B. CCC's Actual Conflict of Interest/Breach of Fiduciary Duty Warranting Less Deferential or *De Novo* Standard of Review

However, when the Plaintiff fails to advance any specific evidence indicating a conflict, the courts apply “modicum less deference.” Dew v. Metro Life Ins. Co., 69 F. Supp. 2d 898, 902 (S.D. Tex. 1999). Here, however, aside from Defendant’s treatment of the surveillance in ignorance of Dr. Meyerhoff’s unwavering opinion, the discrepancy between the administrative record produced to the Plaintiff as additional disclosures and the administrative record that CCC submitted to this Court illuminates CCC’s financial conflict of interest and/or breach of fiduciary duty and erosion of trust principles – the very elements that earn plan administrators the abuse of discretion standard. The

Defendant cannot pick and choose what this Court considers with regard to Mr. Yost's claim and then have its decision reviewed under an abuse of discretion.

Specifically, Defendant via additional disclosures pursuant to this Court's discovery Order produced to the Plaintiff a 521-page administrative record (claim file) containing a cover letter explaining that there were no privileged materials in the claim file and thus there was no need for a privilege log. Subsequently, with its Brief in Support of Summary Judgment, the Defendant provided to this Court and to the Plaintiff a 383-page administrative record for Mr. Yost without a privilege log. This version was bated differently, causing some confusion and forcing Mr. Yost to submit to this Court the initial version of the record that had previously been thoroughly reviewed and bated as referenced by counsel. Recognizing that the initial version is more voluminous in part due to double copies and repetitive information, the Plaintiff cannot be absolutely sure how much or which information is missing from the version last produced by the Defendant. However, particular documents were found to be missing, according to Plaintiff's diligent efforts in comparing the two records in the time period allowed, such as the information concerning Mr. Yost's withholdings from Smith County District Court, Defendant's A.R., (Tab 13) p. 409-420, a CCC Referral Checklist, Defendant's A.R., (Tab 11) p. 325, the Request for Services to Investigative Options (the surveillance company), Defendant's A.R., (Tab 11) p. 321, Mr. Yost's Social Security Award information, A.R., (Tab 6) p. 194 – 195 and scan results dated January 25, 2002, Defendant's A.R., (Tab 4) p. 160-164.

The Plaintiff asks that this Court order the Defendant to clear up such discrepancy, and rule accordingly with regard to the standard of review.

V. **The Surveillance Report Alone Does not Serve as an Adequate Basis to Terminate Mr. Yost's Benefits.**

In Lacour v. LINA, 200 F. Supp. 2d 622 (W.D. La. 2002), the Court instructed that surveillance video may serve as an adequate basis to terminate disability benefits when it is used as a follow-up tool to confirm information that is already known about the claimant's activity. For instance, in Rougeau v. Bellsouth, No. 96-3205, U.S. Dist. LEXIS 7860 (E.D. La. June 4 1997), surveillance was conducted only after an independent medical exam (IME) and many unanswered phone calls to the Plaintiff that attempted to inquire into his alleged activity. The surveillance corroborated the IME, two medical consultant reports and a complete lack of any objective tests in support of disability, and was deemed substantial evidence to support the determination. *See also* Davis v. American General Life & Accident Ins. Co., 906 F. Supp. 1302 (E.D. Mo. 1995) (surveillance plus post-surveillance info concerning efforts to obtain a tavern owner's license and the purchase of a tavern, an attending physician's statement that the claimant was only disabled from her previous occupation and a vocational report that supported a return to work, was substantial evidence where surveillance showed the allegedly blind claimant running the tavern on a daily basis).

However, when a denial of benefits relied on surveillance video alone that showed the claimant driving when he was deemed legally blind and thus was inconsistent with the doctor's opinion, the court held that such denial was not a reasonable determination supported by substantial evidence. Rigby v. Bayer Corp., 933 F. Supp 628 (E.D. Tex. 1996). Similarly, in Marziale v. Hartford, No. 01-480, U.D. Dist. LEXIS 11321 (E.D. La. June 20, 2002), the Court found that the surveillance video was not substantial evidence and thus adequate to survive an arbitrary and capricious standard of

review. Here, the Plaintiff claimed disability due to injuries she sustained in a motor vehicle accident. The activity revealed in the surveillance video (driving, running errands, shuttling children around and bending at waist repeatedly) was consistent on four different occasions *and* the Plaintiff failed to return a continuing disability statement. In addition, the Hartford conducted a personal interview at the claimant's home where suspect behavior was observed in that the Plaintiff would look to her husband for the answers regarding her illness, pain, etc. Last, one of the Plaintiff's doctors after seeing the video changed his opinion and concluded that her condition had stabilized.

The Marziale Court held that reliance on each piece of evidence was an abuse of discretion: "First, the surveillance 'does not reveal anything extraordinary' . . . 'there is nothing in the record suggesting [Plaintiff] was capable of such activity on a sustained basis or that the video documented anything other than a good day.'" Id. at *19 (citations omitted). "Importantly, in this case, none of the sporadic activities conflict with the most recent diagnosis of the Plaintiff's treating orthopedic surgeon, Dr. Parnell, who estimated that the Plaintiff could stand, walk and drive, for one hour each per day." Id. at *20. The Court held that the interviewer's conclusions also did not support a substantial basis and held with regard to both pieces of evidence, relying on Vega v. National Life Ins. Servs., 188 F.3d 287, 302 (5th Cir. 1999), "'we will not countenance a denial of a claim solely because the administrator suspects something may be awry. . . without some *concrete evidence* in the administrative record to support denial of the claim, the Court must find that the administrator abused its discretion.'"

In the case at bar, all notions of common sense and practicality could only tolerate a continuation of benefits. CCC paid Robert Yost for more than three years, and his

condition not only failed to improve despite the many procedures and treatments he underwent, (“Mr. Yost is extremely motivated to locate a job that would get him back in the work force”¹⁴), but clearly worsened. It was agreed upon by all who examined him and all who reviewed his medical records, that Robert’s symptoms were indeed supported by ENG and audiometric findings, that he would have a problem with continuity in any job and that his symptoms if present would prevent him from working. It was clear to CCC that no employer would hire him under these circumstances. Surveillance revealing short drives, a short time spent working on his car at his home, and carrying a piece of furniture, does not negate all that the Defendant knew about Mr. Yost’s ability to perform work on a consistent basis. Most importantly, the record indeed lacked, with only the suspicion raised by the surveillance and nothing more, any concrete evidence on which the Defendant could base a conclusion that Mr. Yost could work with complex visual cues, i.e. a computer or other device, and resume *gainful* work.

It was indeed the suggestion of the Plaintiff’s ability to conduct activity concerning complex visual cues brought on by the surveillance that caused CCC to terminate this claim, as evident by Defendant’s File Activity Sheet, “11/10/01. . .EE understands that surveillance/activities check was conducted and revealed significant levels of activity. EE expressed understanding that surveillance records significant level of activity involving ‘complex visual cues.’ VCM and EE discussed possible settlement.” Defendant’s A.R., (Tab 8) p. 242. Mr. Yost eventually declined the settlement offer. *Id.* at 241. The Defendant thus terminated this claim based on its suspicion that “something may be awry” with regard to Mr. Yost’s ability to conduct activity involving complex visual cues, despite Dr. Meyerhoff’s unchanged opinion of

¹⁴ CCC’s own Labor Market Survey, Defendant’s A.R., (Tab 5) p. 169-172.

the same in response to the surveillance report.¹⁵ The Defendant relied on the surveillance with nothing more.

VI. Response to Defendant's Case Authorities With Regard to the Any Occupation Standard

The Defendant in its Brief in Support of Summary Judgment alleges that the “any occupation” standard is “undemanding,” effectively requiring the claimant to be complete invalid to qualify for disability benefits.

CCC cites Duhon v. Texaco, Inc., 15 F.3d 1302, 1304-1307 (5th Cir. 1994), where the court held that a 66-year old truck driver was able to perform another occupation despite his degenerative disc disease. The Defendant fails to mention that in Duhon, the Plaintiff's treating physician restricted his patient only from truck driving, and two other examining physicians opined he could not return to truck driving but could perform sedentary to light work with no restrictions. The issue on appeal was whether the insurer had an obligation to determine whether Duhon was or may have become qualified to perform “any job” by his “education, training or experience,” and the Fifth Circuit

¹⁵ To be sure, CCC's “VCM E & E Assessment” authored by Bob Cirnigliaro on December 21, 2000: “ Dr. Meyerhoff cleared the EE to perform alternative work on 6/26/00 with restrictions of not being able to do anything associated with noise or complex visual cues. A Labor Market Survey revealed that numerous home based opportunities existed at gainful wage. However, it as determined that the EE did not demonstrate the ability to perform gainful work in the open labor market and Dr. Myerhoff felt that computer type jobs would exacerbate the EE's condition. . . The file was pended for SSD assistance. . . VCM followed up on this file on 9/27/01 and a function questionnaire sent to Dr. Myerhoff indicates that the EE was cleared to work with restrictions pf avoiding complex visual cues and delicate balance situations. . . The surveillance that was conducted on 10/9/01 – 10/12/01 revealed significant levels of activity to include driving, lifting/loading/unloading furniture. . . bending, stooping, and lifting. . . The surveillance information was faxed to Dr. Myerhoff who **again indicated** that the EE could perform alternative work with restrictions of avoiding complex visual cues . . clarified to mean ‘visual signals that are complex such as monitors and traffic while driving’. . . the medical/vocational information does not support a severity in function that would preclude EE not precluded from performing. . . 1)Administrative Assistant – Service industry. 2) Business Unit Manager – Manufacturing Industry. 3)Staffing Coordinator – Manufacturing Industry. 4)Rental Car Agent – Service industry.” All such aforementioned occupations involve using a **monitor**.

concluded Texaco did not have such obligation, overturning the district court's holding to that effect.

Next, the Defendant cited Salazar v. Owens-Illinois, Inc., No. 3:94-CV-1785-D, U.S. Dist. LEXIS 8448 (N.D. Tex. January 8, 1997), in attempts to generalize the case law noting that in that case the insurer was not held to abuse its discretion when it found the Plaintiff could perform other occupations despite serious spinal conditions. In Salazar, the court expressly held the Defendant did not act arbitrary and capriciously *because* it conducted both an independent medical exam and a functional capacity exam by a physician whose credentials were never challenged, as well as a transferable skills analysis that identified jobs in the geographic area that Salazar could perform. Id. at *12-*13.

The Defendant then relied on a group of cases from outside the Fifth Circuit that purport to hold that even those with blindness or limb amputation can work. First, diagnosis does not equate to disability; *whether one can work has solely to do with his specific restrictions and limitations with regard to functional capacity*. For instance, the Defendant relied on Carey v. Apfel, 230 F.3d 131 (5th Cir. 2000) to support the notion that a claimant with an amputated arm could still perform his occupation. Although a limb amputation is a serious impairment, Carey used a prosthesis successfully all day without any problems, and did not experience any pain from his accident, which is what the court considered in affirming the district court's opinion to deny benefits. In fact, the only reason Carey provided for not seeking alternative employment was that he had only worked in the construction industry and did not know any other trade. Id. at 138. CCC cited Davis, 906 F. Supp. at 1309-11 for the proposition that an insured who became

blind was not disabled from any occupation. The Defendant omits from such holding that the insurer learned that the allegedly blind claimant had purchased a cosmetology school in Arkansas and was presently attempting to obtain her Arkansas cosmetology license. Id. at 1305. Further an activities check revealed that she and her family had purchased a tavern and that she was active in its daily operation, specifically “operating a cash register and making change, waiting on customers, mixing drinks, and preparing food.” Id. at 1306.

Contrary to CCC’s position, the courts have vehemently disagreed with the notion that one needs to have a complete loss of functionality in order to be entitled to disability benefits under the subject definition; the court looks instead to the claimant’s specific limitations and background to determine whether an unreasonable decision was made by the Defendant. “An interpretation which gives a reasonable, lawful and effective meaning to all the terms is preferred to an interpretation which leaves a part unreasonable, unlawful, or of no effect.” Meredith v. Allsteel, Inc., 11 F.3d 1354, 1358 (7th Cir. 1993).

“Common knowledge of the occupations in the lives of men and women teach us that there is scarcely any kind of disability that prevents them from following some vocation or other, except in cases of complete mental incapacity. Although the achievements of disabled persons have been remarkable, we will not adopt a strict, literal construction of such a provision which would deny benefits to the disabled if he should engage in some minimal occupation, such as selling peanuts or pencils, which would yield only a pittance. The insured is not to be deemed ‘able’ merely because it is shown that he could perform some task.

To bar recovery, under the provisions of the [plan], the earnings possible must approach the dignity of a livelihood. Mr. Helms is required to show physical inability to follow any occupation from which he could earn a reasonably substantial income rising to the dignity of an income or livelihood, even though the income is not as much as he earned before the disability.”

Helms v. Monsanto Co., Inc., 728 F.2d 1416, 1421-22 (11th Cir. 1984).

The Fifth Circuit in Mutual Life Insurance Co. of New York v. Picard , 155 F.2d 105 (5th Cir. 1946), came to a similar conclusion, finding that a literal interpretation of such policies would result in essentially empty disability insurance.

"The rule prevailing in most jurisdictions is that the total disability contemplated . . . does not mean as its literal construction would require, a state of absolute helplessness which can result only from loss of reason, since as long as one is in full possession of his mental facilities he is capable of transacting some part of his business, whatever it may be although he is incapable of physical action. On the contrary, these courts giving consideration to the subject of the contract, hold that 'total disability' contemplated by the agreement is inability to do substantially all of the material acts necessary to the prosecution of the insured's business or occupation in substantially his customary and usual manner."

Id. at 107 (quoting Crowe v. Equitable Life Assurance Society of U.S., 179 La. 444 (Sup. Ct. 1934); Boughton v. Mutual Life Insurance Co. of N.Y., 183 La. 908 (Sup. Ct. 1935); Mutual Life Ins. Co. v. Daigle, 142 F. 2d 1000 (5th Cir. 1944)).

VII. Dr. Meyerhoff is Not an Occupational Specialist

The Defendant in its Brief continually harps on Dr. Meyerhoff's conclusion that Robert Yost can perform a sedentary occupation, albeit with restrictions, with no regard as to how such restrictions in practicality affect the Plaintiff's ability to obtain gainful employment. Dr. Meyerhoff is not an occupational specialist. He was asked specifically if Mr. Yost could perform full-time work primarily seated in nature and that avoided working around machinery, to which he answered in the affirmative *but* with the restrictions of avoiding visual signals that are complex, such as those involved when working with a computer monitor. Dr. Meyerhoff lacks any training in vocation or any specialized knowledge in job placement or available jobs in the economy, and CCC should have considered his opinion along with such other considerations, including Mr. Yost's vocational background and his ability to find *gainful* work. Interestingly, CCC

gave more weight to Dr. Meyerhoff's forced vocational response than its own Labor Market Survey that concluded Mr. Yost could only perform home-based jobs where he could control noise and could work in solitude. Such opinion should have been considered in conjunction with Dr. Meyerhoff's response to the home-based job suggestion wherein he concluded that home-based computer work¹⁶ would not be an option; the failure to consider the same resulted in an arbitrary and capricious decision.

VIII. CCC's Argument that Mr. Yost is Not Entitled to an Award of Benefits After November 14, 2002, the Date Benefits Were Terminated

Defendant in its Brief makes the convoluted assertion that Mr. Yost is not entitled to any benefits that came due past the date benefits were terminated. The Defendant is asserting that even if the Plaintiff prevailed, he would not be entitled to any past due benefits since the Defendant did not get a chance to review medical information from the time period after the termination of benefits. Yet, benefits were terminated and the claim file was closed disallowing any additional evidence to be submitted. The Plaintiff assumes that the Defendant is not asking that this Court make new law holding that a claimant may never sue an insurance company under a group plan since no benefits are recoverable, but is in essence asking this Court to remand the claim in the event it holds that the Defendant was unreasonable. However, the case at bar does not present an appropriate situation for remand – the Defendant had full opportunity to examine any information it needed, and the Plaintiff is not now asking that additional information be submitted.

CCC couches its argument in the notion that the Plaintiff has not “exhausted his administrative remedies,” and cites case law to support that the failure to exhaust appeal

¹⁶ All home-based opportunities as evident by the record involved working with a computer.

procedures calls for a dismissal of the claim. First, the Defendant deemed that the Plaintiff exhausted all administrative remedies back in March of 2003, when it stated in its final denial letter, “You have exhausted your administrative remedies at this time and this decision is final and binding.”¹⁷ The Defendant thus seems to argue that the Plaintiff has not exhausted *administrative* remedies for the time period *after the claim file closed*, a notion that is both meaningless and offensive in that such requirement does not and could not exist. The Defendant cannot terminate benefits, close the file, and then upon a lawsuit claim it doesn’t owe the Plaintiff past due benefits even if the Court holds the determination was unreasonable, because it did not review information after the close of the file.

If Mr. Yost prevails, he would be entitled to the relief awarded in every ERISA benefit claim, past-due benefits plus interest, as well as reinstatement of the policy, with attorney’s fees being at the discretion of this Court.

IX. Plaintiff’s Statement of Undisputed Material Facts

1. The insured, Robert Yost, was employed at Goodyear Tire & Rubber Company and was an eligible plan participant of Goodyear Tire & Rubber Company’s Long-Term Disability Plan (“The Plan”), insured and administered by Continental Casualty Company (“CCC”), at all times material to this action.

2. Robert Yost became disabled from any occupation on July 9, 1999 due to Inner Ear Disease (Meniere’s Disease, bilateral), severe vertigo, headaches, visual problems and hearing loss.

¹⁷ Defendant’s final denial letter dated March 28, 2003 is attached as Exhibit C to the Plaintiff’s Complaint found in both parties’ submissions of the administrative record.

3. The governing policy lacks any language that attempts to confer discretion/discretionary authority on the plan administrator or CCC.

4. The governing policy and other plan documents lack any language that attempts to require that the claimant submit objective medical evidence such as lab tests or X-rays to substantiate his disability.

5. The subject policy contains the following disability definition for the life of the policy:

“Total Disability” means that, during the Elimination Period and thereafter, the Insured Employee, because of Injury or Sickness, is

- continuously unable to engage in any occupation for which the Insured Employee is or becomes qualified by education, training or experience; and
- under the Appropriate and Regular Care of a legally qualified physician, other than the Insured Employee, whose specialty or expertise is the most appropriate for the Insured Employee’s disabling conditions(s) according to Generally Accepted Medical Practice.”

6. Mr. Yost’s education consists of 2 years of college and an electrical apprenticeship.

7. Mr. Yost has only ever performed the job duties of a mechanic as well as minor administrative tasks.

8. Mr. Yost will experience attacks of vertigo if he uses a computer monitor.

9. It has been opined by Mr. Yost’s treating physicians as well as the Defendant’s medical reviewers that the Plaintiff would have to cease all job duties if experiencing an attack of Meniere’s Disease.

10. The subject policy does not contain any limitations in duration of benefits for illnesses based on self-reported symptoms.

11. Mr. Yost worked for Goodyear Tire & Rubber Company for 16 years.

12. Before Robert Yost became disabled, he was a Maintenance Manager Planner at Goodyear Tire & Rubber Company.

13. It is documented that since the onset of his disability, Mr. Yost has consistently experienced severe vertigo, headaches, visual problems and hearing loss.

14. As documented, Mr. Yost has been treated by an otolaryngologist and an ENT, both who support the notion that Mr. Yost is unable to work at all with his symptoms.

15. CCC, in its initial determination letter of October 14, 2002¹⁸, terminated Mr. Yost's benefits due to its conclusion that he could perform the jobs of administrative assistant, business unit manager, staffing coordinator and rental care agent, despite Dr. Meyerhoff's clear restriction that Mr. Yost could not use a computer.

16. Mr. Yost was determined to be disabled from *any occupation* since January of 2000 by the Social Security Administration (SSA) due to vertiginous syndromes and other disorders of vestibular system.¹⁹

17. The Defendant failed to physically examine Mr. Yost and instead relied on its own interpretation of the medical information submitted to determine the Plaintiff's eligibility for benefits.

18. If Mr. Yost is deemed disabled according to the subject policy by this Court, he is entitled to a monthly benefit amount of \$512.00 from November 14, 2002, when benefits were terminated, to the present, plus interest.

X. Conclusion

It is clear from the Defendant's administrative record that Mr. Yost's claim was paid and accepted based on the fact that the Plaintiff could not perform any work in the

¹⁸ Defendant's administrative record for Mr. Yost as produced to Plaintiff via discovery and attached hereto as Exhibit 1 (hereinafter "Defendant's A.R.") (Tab 9) p. 264

¹⁹ Defendant's A.R., (Tab 6) p. 194

open labor market, according to Dr. Meyerhoff's restrictions, the Labor Market Survey, CCC's medical reviews conducted by John Wiley, M.D. and Herb Wettriech, M.D. and Robert Yost's education, training and experience, until surveillance was obtained that aroused suspicion with regard to the Plaintiff's ability to handle complex visual cues. However, upon investigating such suspicion by contacting Dr. Meyerhoff, the doctor who prescribed such restriction, CCC learned that despite sporadic activity that made the Defendant suspect, the restrictions remained. Defendant terminated Mr. Yost's benefits nonetheless. As discussed *supra*, the courts do not deem surveillance, even when combined with other additional circumstantial evidence, as a substantial basis to support termination of benefits, even under the most deferential arbitrary and capricious standard of review.

Robert Yost had no reason to refrain from returning to work as a mechanic, undoubtedly also a desired hobby, other than his disability; in fact he would want nothing more. Disability at the young age of 46, due to objectively supported and unchallenged impairments, from such occupation that Robert enjoyed and in which he excelled, is tragic indeed. Instead of recognizing such tragedy and providing Mr. Yost with continuing benefits, the Defendant evaded its responsibility. Robert Yost turns to this Court to right this wrong and demand that CCC be held accountable for paying his disability benefits for which premiums were paid and to which he is now and has been so clearly entitled for the last one and one half years.

Respectfully Submitted

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was served this 9th day of June, 2004 via Federal Express overnight mail to: ARTHUR K. SMITH, ESQ., Law Offices of Arthur K. Smith, A Professional Corporation, 507 Prestige Circle, Allen, Texas 75002, (469) 519-2555 (fax).

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