IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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MARK G. HOLOUBEK,

Plaintiff, MEMORANDUM AND ORDER

v. 06-C-121-S

UNUM LIFE INSURANCE COMPANY OF AMERICA,
UNUMPROVIDENT CORPORATION and
JOHNSON CONTROLS, INC. LONG-TERM DISABILITY PLAN,

Defendants.

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Plaintiff Mark G. Holoubek commenced this action against defendants UNUM Life Insurance Company of America, UNUMProvident Corporation and Johnson Controls, Inc. Long-Term Disability Plan alleging violations of the Employee Retirement Income Security Act (ERISA), 29 U.S.C. § 1001 *et seq.*, seeking long-term disability benefits allegedly due under an employee benefit plan governed by ERISA. Additionally, plaintiff seeks an award of attorneys' fees pursuant to 29 U.S.C. § 1132(g)(1).

Defendant UNUM Life Insurance Company of America filed a counterclaim against plaintiff alleging breach of contract and unjust enrichment. Defendant UNUM Life Insurance Company of America seeks the amount of long-term disability benefits it allegedly overpaid to plaintiff under terms expressed in the applicable policy. Jurisdiction is based on 28 U.S.C. § 1331 and 29 U.S.C. § 1132(e)(1). The matter is presently before the Court on the parties' cross-motions for summary judgment. Also presently

before the Court is defendants' amended motion to strike certain submissions filed by plaintiff in support of his motion for summary judgment. The following facts relevant to the parties' motions are undisputed.

BACKGROUND

Plaintiff Mark G. Holoubek was employed as a materials manager by Johnson Controls, Inc. (hereinafter JCI) from approximately March of 2000 until April of 2002. As an employee of JCI, plaintiff participated in its Long-Term Disability Plan. Defendant UNUM Life Insurance Company of America insured JCI's plan and served as its plan administrator. Defendant UNUM Life Insurance Company of America is a wholly-owned subsidiary of defendant UNUMProvident Corporation.[1]

In 1993, physicians at Mayo Clinic diagnosed plaintiff with fibromyalgia. In 2001, physicians confirmed plaintiff's fibromyalgia diagnosis. Additionally, on May 8, 2001 Dr. Daniel Maddox (a physician at Mayo Clinic) diagnosed plaintiff with complex head pain syndrome. In August of 2001 plaintiff took a leave of absence from his position at JCI. He returned to work in December of 2001. However, on March 15, 2002 plaintiff visited Dr. David A. Nye (a neurologist at Midelfort Clinic) and reported that

[1]For the sake of clarity, defendants UNUM Life Insurance Company of America and UNUMProvident Corporation will be collectively referred to as UNUM throughout this memorandum and order.

"his headaches [had] been gradually getting worse since January but [they] worsened precipitously after a trip to Mexico for his company." Plaintiff's last day of work at JCI was April 2, 2002.

Plaintiff initially submitted a claim for short-term disability benefits which defendant UNUM approved in April of 2002. Additionally, the Social Security Administration approved plaintiff's claim for Social Security Disability Income benefits (SSDI) and began paying him SSDI benefits in June of 2002. However, while defendant UNUM was providing benefits to plaintiff it continued to review and investigate his claim.

On April 11, 2002 defendant UNUM requested that Ms. Candace Swafford (a registered nurse) review plaintiff's claim for benefits. Ms. Swafford indicated that "[t]he medical information support[ed] impairment through 4/19/02. There [was] a documented worsening of [plaintiff's] chronic condition with a noted increase in intensity of treatment." Additionally, Ms. Swafford opined that plaintiff's recovery time would vary depending on his response to and nature of treatment. Finally, Ms. Swafford stated that additional information was needed for further review.

Additionally, on May 17, 2002 Mr. Joseph Neale (a clinical consultant) conducted a clinical review of plaintiff's claim. Mr Neale concluded in relevant part as follows:

> ...The information obtained supports the restrictions and limitations such that [plaintiff] would be unable to perform the duties of his occupation as a material manager from 5/12/02-6/15/02 based on the persistence of

> symptoms and frequency of treatment. [Plaintiff] is visiting the AP's office 2-3 times per week for IM treatments. It is not evident at this point that [plaintiff] has sufficient relief to return to work on an intermittent basis.

Mr. Neale conducted an additional clinical review of plaintiff's claim on August 8, 2002 in which he found in relevant part as follows:

> ...The information obtained supports the restrictions and limitations such that [plaintiff] would be unable to perform the duties of his occupation through 9/02/02 on the basis of the severity of symptoms and intensity of treatment being rendered. There has been essentially no indicator of improvement, which would typically be expected with migraines, given the therapy involved....

As part of its continued investigation, defendant UNUM provided Dr. Daniel W. Zimmerman (plaintiff's treating physician at River Falls Medical Center) with a questionnaire in which it requested that Dr. Zimmerman provide a description of plaintiff's diagnosis, restrictions and limitations. On September 25, 2002 Dr. Zimmerman responded by letter to defendant UNUM's request. Said letter states in relevant part as follows:

> [Plaintiff] currently suffers from daily intractable severe headaches. The severity of these headaches and the difficulty in treating them has left him with an inability to do meaningful work on a full-time basis. He is left without any ability to concentrate and focus for more than a few minutes. Because of the severity of pain, he has to frequently change positions, alter his environment and take medications that affect his concentration and focus. Presently he is on chronic narcotic use, prophylactic medicines with tricyclic antidepressants. He is also on antidepressants and muscle relaxing medications. He has undergone courses of physical therapy, ergonomic studies, TENS units, dietary modification and relaxation techniques.

> The prognosis for the patient is unfortunately grim in that he has had minimal improvement now over the last 2 years. Of note: Much of that care was done elsewhere and at present, his care is quite exhausted with little avenues for other treatment. Generally I am seeing him once a month to monitor his medication. While he has improved over the last several months, he still has a significant amount of impairment, which I believe is stable and unlikely to improve further.

After defendant UNUM received Dr. Zimmerman's information it requested that its in-house physician Dr. Richard Vatt (board certified in occupational medicine) review plaintiff's claim. On November 19, 2002 Dr. Vatt provided defendant UNUM with a report detailing his opinions. Said report states in relevant part as follows:

> [Plaintiff] consistently presents complaints of headache and somatic pain. The reported migraine headaches are presented as occurring daily and constantly. Migraine headaches are usually episodic and not every day and/or continuous, as presented. The level of incapacity is inconsistently documented....[Plaintiff] has claimed to have concentration and cognitive impairment. The record provides no documentation of an evaluation or assessment to validate the level of claimed cognitive impairment.
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> ...Headache has been consistently reported with the etiology being attributed to tension and migraines. [Plaintiff] reports symptoms of photophobia, aura, nausea with occasional emesis and unilateral pain, which are consistent with the diagnosis of migraine cephalgia. It is uncommon for migraine headaches to occur each and every day as is reported in this claim. It is also uncommon to not receive some benefit from the various nonnarcotic headache medications as is reported in this record. The only medication that appears to provide any report of improving the symptoms is morphine injections or related oral medications (MS-Contin).
>
> ...The record indicates that [plaintiff] was diagnosed as having Fibromyalgia in 2001. The record does not

> contain documentation as to the evaluations that lead to this label. Fibromyalgia is a controversial diagnosis. There isn't a test to confirm or rule out the condition. ...The ACR criteria are a clinical construct initially developed to classify observations and serve as a research definition. The reported symptoms are not specific and often overlap with other syndromes. Frederick Wolfe, MD, the primary author in developing the ACR criteria for fibromyalgia has written, "[t]here is little evidence that FM...is a disease, and many of us who developed the FM construct still consider it a syndrome[.]" ...Dr. Wolfe has stated, "[w]e must halt the trend to label patients with FM...as disabled, and we must interfere with the societal trend toward encouragement of the disability concept."...
>
> ...The medical literature does support that, "[t]here is no evidence that fibromyalgia is a crippling or incapacitating disorder or is a prodrome for a more serious illness."...Identification of "tender points" is easily manipulated by both the Examiner...and the Patient's self-reported description fo the sensation.

On November 21, 2002 after defendant UNUM received Dr. Vatt's report it notified plaintiff by letter of its decision to provide him with long-term disability benefits under a reservation of rights. Plaintiff continued to receive long-term disability benefits on a regular basis until April of 2003.

On April 1, 2003 plaintiff submitted a "claimant's supplemental statement" in which he indicated that he was unable to perform his occupational duties because of "sleep loss, light sensitivity, irritable bowels, loss of balance, nausea, vomiting, inability to concentrate, severe muscle spasms, migraine/headaches daily, and continuous ear ringing." Additionally, plaintiff described his activity level as follows: "I spend the vast majority of my time in my apartment in a quiet setting, trying to manage the

muscle spasms, headaches[,] migraines and other bodily d[y]sfunctions."

Additionally, in or around April of 2003 plaintiff provided defendant UNUM with an attending physician's statement from Dr. Zimmerman in which he described plaintiff's symptoms as "stable severe daily" headaches. Dr. Zimmerman further noted that chronic pain impaired plaintiff's work capacity. Finally, Dr. Zimmerman explained plaintiff's limitation. He opined that plaintiff was "unable to effectively concentrate on a reliable basis."

In connection with his attending physician's statement, Dr. Zimmerman prepared a physical abilities form. Dr. Zimmerman indicated that plaintiff was unable to drive and he could walk for only one hour at a time during the course of a work day. Additionally, Dr. Zimmerman expressed that plaintiff could only be exposed to very quiet environmental conditions and his ability to concentrate was severely impaired.

On April 7, 2003 a representative of JCI requested that defendant UNUM initiate surveillance of plaintiff because he was "spotted out hunting." Accordingly, on April 15, 2003 defendant UNUM's field representative Mr. Michael O'Brien met with plaintiff at his residence. Mr. O'Brien noted that plaintiff appeared to be in pain. Additionally, he observed that plaintiff walked slowly with an unsteady gait and he used furniture to support himself as he moved through his home. During the interview, plaintiff

discussed his physical difficulties with Mr. O'Brien. Plaintiff indicated that he experienced ringing in his ears, daily migraines, dizziness, problems sleeping, muscle spasms, and sensitivity to heat and cold. Additionally, plaintiff stated that "[t]he more active he is, the more he aggravates his pain causing more spasms."

On May 7, 2003 defendant UNUM began conducting surveillance of plaintiff. It conducted such surveillance from May 7, 2003 through May 10, 2003. On May 7, 2003 plaintiff was observed departing his residence at 1:51 p.m. He then drove to an apartment complex in River Falls, Wisconsin. Plaintiff left said complex at 1:57 p.m. and he drove to a different apartment complex in River Falls, Wisconsin which was under construction on Broadway Street (hereinafter the Broadway Street complex). Plaintiff arrived at the Broadway Street complex at 2:09 p.m. While he was there he was observed conversing with a construction worker and pacing on a second floor porch while talking on a cellular telephone. Plaintiff left the Broadway Street complex at 2:27 p.m.

On May 8, 2003 plaintiff was observed leaving his residence at 9:07 a.m. He then drove to Ross & Associates which is located in River Falls, Wisconsin. Plaintiff left Ross & Associates at 12:44 p.m. He then drove to the Broadway Street complex. Plaintiff remained at the Broadway Street complex for twenty minutes. Upon his departure, plaintiff drove to the St. Croix Center for Healing Arts and the Miller and Wallace Chiropractic Office Building

located in Hudson, Wisconsin. At 3:06 p.m. plaintiff's vehicle was again observed at the Ross & Associates building. Plaintiff returned to his residence at 4:03 p.m. that afternoon and surveillance was terminated at 5:00 p.m. that evening.

On May 9, 2003 plaintiff was observed departing his residence at 8:06 a.m. At 9:43 a.m. plaintiff's vehicle was located at the Broadway Street complex. Between 10:06 a.m. and 10:51 a.m. plaintiff traveled between the Ross & Associates building and the Broadway Street Complex. Plaintiff returned to his residence at 10:54 a.m. However, plaintiff was again observed leaving his apartment at 11:13 a.m. He then traveled to Columbia Heights, Minnesota where arrived at a restaurant at 11:55 a.m. Plaintiff remained at the restaurant until 12:37 p.m. After he left, plaintiff traveled to Roseville, Minnesota where he arrived at a hardware company at 12:51 p.m. Plaintiff remained at the hardware company until 1:24 p.m. Surveillance was terminated at 3:40 p.m. because defendant UNUM's investigator was unable to locate either plaintiff or his vehicle.

On May 10, 2003 plaintiff was observed at the Broadway Street complex at 7:25 a.m. where he remained until 11:22 a.m. While he was at the Broadway Street complex plaintiff conversed with individuals at the construction site, carried boxes of building materials over his shoulder, moved materials around the site, and loaded building materials into a pick-up truck. Plaintiff left the

Broadway Street complex momentarily and then returned to the site at 11:52 a.m. While plaintiff was at the Broadway Street complex he operated an industrial construction forklift and ate pizza with others who were working at the site. At 12:38 p.m. plaintiff again left the Broadway Street complex and traveled to the Ross & Associates building where he remained until 2:16 p.m.

After he left the Ross & Associates building plaintiff traveled to the Broadway Street complex where he again operated the industrial construction forklift, unloaded trash, and talked on his cellular telephone. Plaintiff remained at the Broadway Street complex until 4:37 p.m. Surveillance was terminated at 4:41 p.m.

Defendant UNUM provided its surveillance to Dr. Vatt for his review. On May 30, 2003 Dr. Vatt provided defendant UNUM with a report in which he expressed skepticism about plaintiff's subjective complaints. Dr. Vatt's report states in relevant part as follows:

> Surveillance video of an individual reported to be [plaintiff] demonstrates participation in activities including driving an automobile, operating a lift hoist at a construction site, lifting various objects, walking, and bending forward at the waist. [Plaintiff] maneuvered the lift hoist to elevate a pallet containing boxes to the second story of the building.
>
> With a reasonable degree of medical certainty, the activities demonstrated on the surveillance video:
>
> 1. Exceed the claimed restrictions or limitations of no driving, not walking more than 1 hour, no overhead lifting, and noise intensity is to be "very quiet."
> 2. Operating the construction equipment and driving would indicate concentration is not "severely impaired."

> 3. Are inconsistent with [plaintiff's] reported activities of leaving the apartment about one or two times a week for shopping and errands.
> 4. Show [plaintiff] being able to perform activities that exceed the R/Ls provided by his Doctor on 3/20/03.

Accordingly, on June 11, 2003 defendant UNUM notified plaintiff by telephone of its decision to suspend his benefits because its evaluation of both the medical and surveillance information did not support a claim for long-term disability benefits.

On June 26, 2003 defendant UNUM's field consultant Mr. O'Brien met with Dr. Zimmerman and showed him the surveillance. Dr. Zimmerman appeared "very surprised" at the level of plaintiff's activity. Accordingly, on July 14, 2003 defendant UNUM received a letter from Dr. Zimmerman which states in relevant part as follows:

> [Plaintiff] had stated to me his level of functioning would preclude driving or doing any effective work. I refer to my note of March 20, 2003, which recorded him as saying he has friends look over his paperwork and book work and for really more than a thirty minute period he is unable to concentrate. He is having friends drive him except for the shortest trips. I also reference my note of June 12, 2003, where [plaintiff] states he had had some small improvement in his symptoms and that he only had two or three severe headaches a week that disable him for one to two days each, leaving him with one or two good days a week.
>
> In regards to the video that we watched dated May 10, on that day [plaintiff] showed no behaviors consistent with those he has been describing and the fact that he is working is not consistent with what he has told me in the past.

On July 18, 2003 defendant UNUM notified plaintiff by letter of its decision to terminate his long-term disability benefits. Said letter states in relevant part as follows:

...According to the policy under which you are covered:

You are disabled when UNUM determines that:
- you are limited from performing the material and substantial duties of your regular occupation due to sickness or injury...

...After 12 months of payments, you are disabled when UNUM determines that due to the same sickness or injury, you are unable to perform the duties of any gainful occupation for which you are reasonably fitted by education, training or experience.

As of March 2003, Dr. Zimmerman stated that you [] had stable, severe daily headaches and that your limitations were that you were unable to concentrate on a reliable basis, walking duration of 1 hour at a time, no driving, no lifting above the head, noise intensity-very quiet, and that you were restricted due to medication use.

Our Vocational Consultant provided further review of your occupation[] as Materials Manager....The fundamental tasks involved with this occupation are:

...1. Preparing instructions regarding purchasing systems and procedures.
2. Preparing and issuing purchase orders and changing notices to purchasing agents.
3. Analyzing market and delivery conditions to determine present and future material availability and preparing market analysis reports.
4. Reviewing purchase order claims and contracts for conformance to company policy.
5. Developing and installing clerical and office procedures and practices, and studying work flow, sequence of operations, and office arrangement to determine expediency of installing new or improved office machines.
6. Arranging for disposal of surplus materials.

During the evaluation of your claim, we obtained records from the following healthcare providers:
Dr. Zimmerman
Luther Hospital

During our evaluation of your claim, we elected to observe your spontaneous daily activities. We received

> a report and video record of your activities over four consecutive days.
>
> The available information and records were reviewed by our board certified physician in May 2003, during which it was determined that your spontaneous daily activities were inconsistent with your claimed restrictions and limitations....
> Our board certified physician opined that your involvement in driving and operating construction equipment would require concentration at levels inconsistent with your claimed restrictions and limitations.
>
> ...Given the information obtained during the documentation of your activities, we elected to meet with Dr. Zimmerman to obtain his comments about your activities....
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> Dr. Zimmerman indicated that he relied on your self-report as relates to your specific restrictions and limitations. Dr. Zimmerman commented, based on his review of the surveillance, that you "showed no behaviors consistent with those that he has been describing and the fact that he is working is not consistent with what he has told me in the past."
>
> Based on our comprehensive review of the entire claim file, we have determined that you do not qualify for benefits under the terms of your employer-sponsored policy.

Additionally, defendant UNUM's letter described its appeals procedures and provided plaintiff with the address in which to send an appeal.

On September 24, 2003 plaintiff (through counsel) notified defendant UNUM by letter of his decision to appeal the adverse benefit determination. Accordingly, on January 29, 2004 plaintiff submitted an extensive appeal which included a forty-two page appeal letter and thirty-five exhibits. Included in plaintiff's

appeal was extensive "rebuttal" evidence concerning his observed activities during the surveillance. Plaintiff argued that defendant UNUM should give said surveillance minimal weight because the activities observed were not typical. In support of his assertion, plaintiff submitted statements of various individuals who were working with him at the Broadway Street complex during the surveillance period. These individuals indicated that plaintiff doubled up on his medication to help at the construction site. Additionally, they indicated that while plaintiff was at the site he would lose his place in discussions, repeat himself during conversations, experience muscle spasms, dizziness and migraines. Further, plaintiff's counsel described his situation as "desperate" and explained that he feared losing a financial investment in the Broadway Street complex.

Defendant UNUM provided plaintiff's appeal information to Dr. E.C. Curtis (board certified in occupational medicine) for a medical review. Additionally, it requested that Dr. John M. Bollinger conduct a clinical psychiatric review of plaintiff's file. On May 18, 2004 after defendant UNUM received its requested reviews it notified plaintiff by letter of its decision to uphold the termination of his long-term disability benefits.

However, after receiving additional information from plaintiff defendant UNUM provided his entire claim file to Dr. Elizabeth White Hendrikson (board certified in clinical neuropsychology) for

her review. On October 14, 2004 after it received Dr. Hendrikson's report defendant UNUM again notified plaintiff by letter of its decision to uphold the termination of his long-term disability benefits. In response, plaintiff submitted additional information from one of his physicians. On June 6, 2005 defendant UNUM notified plaintiff by letter that it had thoroughly reviewed his claim in two previous appellate reviews and that his additional information failed to alter its determination. Accordingly, plaintiff commenced this action on March 6, 2006.

MEMORANDUM

Plaintiff asserts defendant UNUM denied him a full and fair review of his claim because it operated under a conflict of interest, denied his benefits based on selective evidence and ignored its own policies. Additionally, plaintiff asserts defendant UNUM's decision to terminate his long-term disability benefits was arbitrary and capricious. Accordingly, plaintiff argues he is entitled to summary judgment.

Defendants assert defendant UNUM's decision to terminate plaintiff's long-term disability benefits was not arbitrary and capricious for three reasons. First, defendants assert plaintiff failed to provide reliable, consistent and contemporaneous clinical evidence to support his restrictions and limitations. Second, defendants assert the surveillance supports its decision to

terminate. Finally, defendants assert termination was supported by the reports of their consulting physicians. Accordingly, defendants argue they are entitled to summary judgment. Additionally, defendant UNUM asserts it is entitled to reduce the amount of a claimant's disability benefits by the amount of SSDI benefits a claimant receives pursuant to an offset provision contained within JCI's policy. Accordingly, defendant UNUM argues it is entitled to recover the amount of benefits it overpaid to plaintiff and as such its motion for summary judgment on its counterclaim must be granted.

Summary judgment is appropriate where the "pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56 (c).

A fact is material only if it might affect the outcome of the suit under the governing law. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248, 106 S.Ct. 2505, 2510, 91 L.Ed.2d 202 (1986). Disputes over unnecessary or irrelevant facts will not preclude summary judgment. Id. Further, a factual issue is genuine only if the evidence is such that a reasonable fact finder could return a verdict for the non-moving party. Id. A court's role in summary judgment is not to "weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial." Id. at 249, 106 S.Ct. at 2511.

To determine whether there is a genuine issue of material fact for trial courts construe all facts in the light most favorable to the non-moving party. Heft v. Moore, 351 F.3d 278, 282 (7th Cir. 2003)(citation omitted). Additionally, a court draws all reasonable inferences in favor of that party. Id. However, the non-movant must set forth "specific facts showing that there is a genuine issue for trial" which requires more than "just speculation or conclusory statements." Id. at 283 (citations omitted).

As a preliminary matter, the Court must address defendants' amended motion to strike certain submissions filed by plaintiff in support of his motion for summary judgment. Defendants argue that information submitted by plaintiff concerning both the Regulatory Settlement Agreement (RSA) and the State of California's investigation should be stricken because they were not part of the administrative record. Plaintiff does not dispute that such information is outside the administrative record in this action. However, plaintiff argues the Court may consider such evidence because defendant UNUM acted under a conflict of interest when it determined his right to benefits.

According to the plain language of JCI's policy defendant UNUM maintains "discretionary authority to interpret the terms of the Plan and to determine eligibility for and entitlement to Plan benefits...." Such language clearly and unequivocally states that the plan grants defendant UNUM (as plan administrator)

discretionary authority. *See* Perugini-Christen v. Homestead Mortgage Co., 287 F.3d 624, 626 (7th Cir. 2002). Accordingly, such discretionary determinations are reviewed under an arbitrary and capricious standard of review. Firestone Tire & Rubber Co. v. Bruch, 489 U.S. 101, 115, 109 S.Ct. 948, 956-957, 103 L.Ed.2d 80 (1989).

Deferential review of an administrative decision means review on the administrative record. Perlman v. Swiss Bank Corp. Comprehensive Disability Prot. Plan, 195 F.3d 975, 981-982 (7th Cir. 1999). Accordingly, where the arbitrary and capricious standard applies judicial review is ordinarily limited to evidence that was submitted in support of the application for benefits. Id. at 982. However, at times additional discovery is appropriate to ensure that plan administrators have not acted arbitrarily and that conflicts of interest have not contributed to an unjustifiable denial of benefits. Semien v. Life Ins. Co. of North Am., 436 F.3d 805, 814-815 (7th Cir. 2006). Accordingly, where a plaintiff makes specific factual allegations of misconduct or bias in a plan administrator's review procedures limited discovery is appropriate. Id. at 815 (citations omitted).

An ERISA plaintiff must demonstrate two factors before such limited discovery becomes appropriate. First, said plaintiff must identify a specific conflict of interest or instance of misconduct. Id. Second, a plaintiff must make a prima facie showing that there

is good cause to believe limited discovery will reveal a procedural defect in the plan administrator's determination. Id. (citation omitted). Additionally, courts should limit discovery except in exceptional circumstances. Id.

In plaintiff's brief filed in support of his motion for summary judgment[2] he asserts that defendant UNUM: (1) selectively relied on portions of reports from its in-house physicians while disregarding reports of attending physicians, (2) "hand-picked" its reviewing physician (Dr. Vatt) who was openly critical of the medical basis of fibromyalgia, (3) terminated benefits before any surveillance or medical review occurred; and (4) changed its reasons for denial on more than one occasion. Accordingly, plaintiff argues these examples demonstrate that defendant UNUM not only acted under a conflict of interest but also that it failed to give his claim a full and fair review.

However, while such assertions concern the second factor of the Semien test they fall short of satisfying the first factor of said test. Accordingly, the Court's review is limited to a review of the administrative record because this action does not present exceptional circumstances which warrant consideration of extraneous evidence. As such, the Court cannot consider either the RSA or

[2]In his brief filed in opposition to defendants' motion to strike plaintiff directed the Court to his brief filed in support of his motion for summary judgment pages 21-24 where he identified examples of defendant UNUM's alleged conflict of interest.

information concerning the State of California's investigation and defendants' motion to strike is granted. The remainder of the parties' arguments concern the merits of defendant UNUM's decision to terminate plaintiff's long-term disability benefits. Accordingly, the Court must address whether defendant UNUM's decision to terminate plaintiff's benefits was arbitrary and capricious.

**A. Arbitrary and Capricious**

Under the arbitrary and capricious standard it is not the Court's function to decide whether defendant UNUM reached the correct conclusion or "even whether it relied on the proper authority." Kobs v. United Wis. Ins. Co., 400 F.3d 1036, 1039 (7th Cir. 2005)(*citing* Cvelbar v. CBI Ill. Inc., 106 F.3d 1368, 1379 (7th Cir. 1997)). Rather, the only question is whether defendant UNUM's decision was completely unreasonable. Manny v. Cent. States, Se. & Sw. Areas Pension & Health & Welfare Funds, 388 F.3d 241, 243 (7th Cir. 2004).

Additionally, an administrator's decision is arbitrary and capricious only when it "relied on factors which Congress ha[d] not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that [ran] counter to the evidence, or is so implausible that it could not [have been] ascribed to difference in view of the product of expertise." Trombetta v. Cragin Fed. Bank for Sav. Employee Stock

Ownership Plan, 102 F.3d 1435, 1438 (7th Cir. 1996)(citations and internal quotation marks omitted).

While an administrator's determinations are reviewed in a deferential light the arbitrary and capricious standard does not permit a Court to simply "rubber stamp" an administrator's decision. Swaback v. Am. Info. Tech. Corp., 103 F.3d 535, 540 (7th Cir. 1996)(*citing* Donato v. Metro. Life Ins. Co., 19 F.3d 375, 380 (7th Cir. 1994)). Rather, five factors are evaluated to determine whether the administrator's decision was reasonable. Said factors are as follows: (1) impartiality of the decision-making body, (2) complexity of issues, (3) process afforded the parties, (4) extent to which decision-makers utilized the assistance of experts where necessary; and (5) soundness of the fiduciary's ratiocination. Chalmers v. Quaker Oats Co., 61 F.3d 1340, 1344 (7th Cir. 1995)(*citing* Exbom v. Cent. States Health & Welfare Fund, 900 F.2d 1138, 1142 (7th Cir. 1990)).

Defendant UNUM's decision to terminate plaintiff's benefits was not sound. Additionally, on July 18, 2003 when defendant UNUM notified plaintiff of its decision to terminate his benefits it offered an explanation that ran counter to the evidence. Accordingly, defendant UNUM's decision to terminate plaintiff's long-term disability benefits was arbitrary and capricious.

On July 18, 2003 when defendant UNUM made its initial adverse benefit determination plaintiff's claim file contained the

following relevant information: (1) Ms. Swafford's April 11, 2002 review, (2) Mr. Neale's May 17, 2002 and August 8, 2002 clinical reviews, (3) Dr. Zimmerman's September 25, 2002 letter, (4) Dr. Vatt's November 19, 2002 report, (5) Dr. Zimmerman's attending physician's statement and physical abilities form, (6) the surveillance information, (7) Dr. Vatt's May 30, 2003 report; and (8) Dr. Zimmerman's July 14, 2003 letter.

In her April 11, 2002 review Ms. Swafford concluded that "the medical information support[ed] impairment...[and] [t]here [was] a documented worsening of [plaintiff's] chronic condition with a noted increase in intensity of treatment." Additionally, in his May 17, 2002 and August 8, 2002 clinical reviews Mr. Neale indicated that "information obtained support[ed] the restrictions and limitations such that [plaintiff] [was] unable to perform the duties of his occupation." Further, in his September 25, 2002 letter Dr. Zimmerman opined that "[t]he severity of [plaintiff's] headaches and the difficulty in treating them ha[d] left him with an inability to do meaningful work on a full-time basis." Finally, in his attending physician's statement and physical abilities form Dr. Zimmerman concluded that plaintiff's chronic pain impaired his work capacity and his ability to concentrate was severely impaired. Accordingly, evidence contained within the administrative record (before defendant UNUM conducted its surveillance) supported

plaintiff's award of benefits.[3]

Defendants argue that defendant UNUM's surveillance, Dr. Vatt's May 30, 2003 report and Dr. Zimmerman's July 14, 2003 letter demonstrate that defendant UNUM's decision to terminate plaintiff's long-term disability benefits was not arbitrary and capricious. It is undisputed that defendant UNUM's surveillance showed plaintiff engaged in numerous activities which were inconsistent with his reported activity level and limitations including: (1) driving an automobile, (2) operating a forklift at a construction site, (3) lifting various objects, (4) walking and bending forward at the waist; and (5)leaving his apartment on four continuous days.

However, during the appeals process plaintiff's counsel described his situation as "desperate" and explained that plaintiff feared losing his financial investment in the Broadway Street complex. A desperate person might "force himself to work despite an illness that everyone agree[s] [is] totally disabling." Hawkins v. First Union Corp. Long-Term Disability Plan, 326 F.3d 914, 918 (7th Cir. 2003)(citations omitted). Additionally, even a desperate person may not be able to maintain such a level of effort indefinitely. Id. Accordingly, defendant UNUM's four days of

[3] While Dr. Vatt's November 19, 2002 report was included in the administrative record before defendant UNUM conducted surveillance said report simply expresses his opinions concerning plaintiff's claimed headache symptoms, his claimed cognitive impairment and his fibromyalgia diagnosis. Dr. Vatt never reaches the question of whether plaintiff was limited from performing the material and substantial duties of his occupation.

surveillance is of little value because it fails to demonstrate that plaintiff could sustain such a level of activity on a continuous basis.[4]

Additionally, JCI's long-term disability plan states in relevant part as follows:

> You are disabled when Unum determines that:
> -you are limited from performing the material and substantial duties of your regular occupation due to your sickness or injury...
>
> After 12 months of payments, you are disabled when Unum determines that due to the same sickness or injury, you are unable to perform the duties of any gainful occupation for which you are reasonably fitted by education, training or experience.

Defendant UNUM terminated plaintiff's benefits within the twelve month period. Accordingly, the first section of defendant UNUM's disability definition applied to his claim. Dr. Vatt's May 30, 2003 report, Dr. Zimmerman's July 14, 2003 letter, and defendant UNUM's July 18, 2003 termination letter all fail to explain how plaintiff's observed surveillance activities proved that he could perform the material and substantial duties of his occupation as a materials manager. While all these documents indicate that plaintiff's level of activity either exceeded or was

[4] In fact, May 10, 2003 was arguably the only day in which plaintiff was observed participating in activities continuously throughout the day. This further supports the Court's conclusion that defendant UNUM's surveillance is of little value because it fails to demonstrate that plaintiff could sustain such a level of activity on a continuous basis.

inconsistent with his claimed restrictions and limitations they all fail to conclude that plaintiff's activities were in any manner related to his occupation. Under the terms of JCI's policy defendant UNUM was required to find that plaintiff was capable of performing the material and substantial duties of his occupation before it could terminate his benefits. Defendant UNUM failed to make such a determination. Accordingly, it was arbitrary and capricious for defendant UNUM to terminate plaintiff's benefits.[5]

**B. Remedy**

Defendants assert that even if defendant UNUM's decision to terminate plaintiff's benefits was arbitrary and capricious he is only entitled to disability benefits through September of 2003. Defendants argue this is the proper remedy because JCI's policy changes the definition of disability from "own" to "any" occupation after twelve months and the administrative record does not contain any evidence concerning plaintiff's ability to work in any occupation. Plaintiff argues retroactive reinstatement of benefits to the date of judgment is the proper remedy.

It is well-established that in certain cases retroactive reinstatement of benefits is the proper remedy. Quinn v. Blue Cross & Blue Shield Ass'n, 161 F.3d 472, 477 (7th Cir.

[5] While plaintiff apparently received a comprehensive review on appeal, such a review does not cure defendant UNUM's initial arbitrary and capricious decision to terminate plaintiff's long-term disability benefits. Accordingly, the Court need not address the sufficiency of defendant UNUM's appeals process in this action.

1998)(citation omitted). Cases that call for reinstatement usually either involve "claimants who were receiving disability benefits, and, but for their employers' arbitrary and capricious conduct, would have continued to receive the benefits, or they involve situations where there is no evidence in the record to support a termination or denial of benefits." Id. (citations omitted).

However, in cases where a plan administrator failed to afford a plaintiff adequate procedures in its *initial* denial of benefits the appropriate remedy is to remand the action to the plan and direct it to provide plaintiff with the procedures he or she was *initially* entitled to receive. Hackett v. Xerox Corp. Long-Term Disability Income Plan, 315 F.3d 771, 776 (7th Cir. 2003)(citation omitted; emphasis added). The distinction between reinstatement and remand focuses on what is required to fully remedy the defective procedures given the status quo prior to denial or termination. Id. (citation omitted). In this action, reinstatement restores the status quo between the parties.

On November 21, 2002 defendant UNUM agreed to provide plaintiff with long-term disability benefits under a reservation of rights. Plaintiff continued to receive long-term disability benefits on a regular basis until April of 2003. Accordingly, plaintiff *initially* received the procedures to which he was entitled because defendant UNUM *initially* granted his claim for benefits. Plaintiff would have continued to receive such benefits

*but for* defendant UNUM's arbitrary and capricious decision to terminate on July 18, 2003. Accordingly, this is an action where remedying the defective procedures requires reinstatement of benefits because such a remedy restores the status quo that existed between the parties prior to defendant UNUM's defective termination. Id.

Defendant UNUM maintains the right to initiate a review of plaintiff's continuing eligibility for long-term disability benefits under the "any" occupation definition of disability. Halpin v. W.W. Grainger, Inc., 962 F.2d 685, 697 (7th Cir. 1992). Should defendant UNUM determine that plaintiff's condition does not prohibit him from performing the duties of any gainful occupation for which he is reasonably fitted by education, training or experience then it is entitled to terminate his benefits. *See* Hackett, at 777. However, on the basis of the processes undertaken to date defendant UNUM cannot be permitted to terminate benefits which it previously awarded. Halpin, at 697-698.

**C. Defendant UNUM's Counterclaim**

Defendant UNUM asserts JCI's policy provides an offset provision which permits it to reduce the amount of plaintiff's disability benefits by the amount of SSDI benefits he receives. Accordingly, defendant UNUM argues it is entitled to summary judgment on its counterclaim and as such it is allowed to recover

its overpayment amount of $8,410.50. Plaintiff argues defendant UNUM is not entitled to summary judgment on its counterclaim because the relief it seeks is an impermissible legal remedy rather than a permissible equitable remedy.

Defendant UNUM's counterclaim states a cause of action under state law theories of breach of contract and unjust enrichment. ERISA preempts all state laws which "relate to any employee benefit plan" unless the state law "regulates insurance, banking, or securities." Smith v. Blue Cross & Blue Shield United of Wis., 959 F.2d 655, 657 (7th Cir. 1992)(*quoting* 29 U.S.C. §§ 1144(a); 1144(b)(2)(A). Accordingly, because breach of contract and unjust enrichment do not regulate insurance, banking, or securities they are preempted by ERISA. Id. at 657-658.

This does not, however, end the Court's analysis because 29 U.S.C. § 1132(a)(3) grants a fiduciary (such as defendant UNUM) authority to commence a civil action under ERISA. Accordingly, the Court must determine if defendant UNUM's counterclaim states a permissible cause of action under section 1132(a)(3). Said section states in relevant part as follows:

> A civil action may be brought-
>
> ...(3) by a ...fiduciary (A) to enjoin any act or practice which violates any provision of this subchapter or the terms of the plan, or (B) to obtain other equitable relief (i) to redress such violations or (ii) to enforce any provisions of this subchapter or the terms of the plan

Accordingly, defendant UNUM is entitled to bring its cause of

action if its counterclaim seeks equitable relief because section 1132(a)(3) creates federal jurisdiction over equitable claims commenced by plans. However, equitable relief means something less than all relief. Great-West Life & Annuity Ins. Co. v. Knudson, 534 U.S. 204, 209, 122 S.Ct. 708, 712, 151 L.Ed.2d 635 (2002)(citation omitted). Additionally, the Seventh Circuit has interpreted the Supreme Court's decision in Great West as holding that as a rule a plan's demand to be reimbursed for benefits wrongly paid is not an equitable claim rather it is a quest for money damages. Leipzig v. AIG Life Ins. Co., 362 F.3d 406, 410 (7th Cir. 2004). Accordingly, the Seventh Circuit classifies such claims as legal rather than equitable. Id.

Defendant UNUM wants money. It is not seeking the return of checks that it issued to plaintiff. Great-West rejected the possibility of applying the restitution label to demands of this kind. Id. Accordingly, the Court lacks subject matter jurisdiction over defendant UNUM's counterclaim because it is a legal claim rather than an equitable one. Id. As such, the Court must not only deny defendant UNUM's motion for summary judgment on its counterclaim but it must also dismiss said claim for lack of subject matter jurisdiction.

Plaintiff Mark G. Holoubek is entitled to summary judgment as a matter of law because defendant UNUM's decision to terminate his benefits was arbitrary and capricious. As such, the proper remedy

in this action is reinstatement of plaintiff's benefits because such a remedy restores the status quo that existed between the parties. The Court cannot address plaintiff's motion for attorneys' fees because neither party briefed the issue. Additionally, defendant UNUM's counterclaim must be dismissed because its state law theories are preempted by ERISA and it seeks legal rather than equitable relief which quashes the Court's subject matter jurisdiction under ERISA.

ORDER

IT IS ORDERED that plaintiff Mark G. Holoubek's motion for summary judgment is GRANTED.

IT IS FURTHER ORDERED that defendants UNUM Life Insurance Company of America, UNUMProvident Corporation, and Johnson Controls, Inc. Long-Term Disability Plan's motion for summary judgment is DENIED.

IT IS FURTHER ORDERED that defendant UNUM's July 18, 2003 decision to terminate plaintiff's long-term disability benefits is VACATED and defendant UNUM is directed to retroactively reinstate plaintiff's long-term disability benefits effective April 26, 2003. Defendant UNUM maintains the right to initiate a review of plaintiff's continuing eligibility for long-term disability benefits under the "any" occupation definition of disability outlined in the applicable policy.

IT IS FURTHER ORDERED that judgment is entered in favor of plaintiff against defendant UNUM dismissing defendant UNUM's counterclaim and all claims contained therein with prejudice and costs.

Entered this 22nd day of August, 2006.

BY THE COURT:

s/

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JOHN C. SHABAZ

District Judge