IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

2025 MTWCC 2

WCC No. 2025-00700

BENJAMIN COVINGTON

Petitioner

vs.

MONTANA STATE FUND

Respondent/Insurer.

ORDER DENYING RESPONDENT'S MOTION FOR SUMMARY JUDGMENT

Summary: The Respondent moves for summary judgment on the Petitioner's claim for TPD benefits. The Respondent asserts that the TPD statutes require a "medically determined physical restriction," but that, on the record, the Petitioner does not have one for several reasons: first, the Petitioner can physically perform the activities on the Medical Status Form and that make up his time-of-injury job; and second, the restriction imposed by his medical providers – "[The Petitioner] [n]eeds ample recovery time if he has a pain flareup – 1-2x a week to recover" – is too subjective and too unpredictable to suffice.

Held: The Respondent is not entitled to summary judgment. On the record, the Respondent has not established that the Petitioner does not have a "medically determined physical restriction" for purposes of the TPD statutes, §§ 39-71-712(1), and 39-71-116(37), MCA (2019).

¶ 1 The Respondent Montana State Fund (State Fund) moves for summary judgment. State Fund asserts that the Petitioner Benjamin Covington does not have a "medically determined physical restriction" as required under the temporary partial disability (TPD) statutes, §§ 39-71-712(1), and 39-71-116(37), MCA, because: he can physically perform the activities on the Medical Status Form and that make up his time-of-injury job; and his restriction — "Needs ample recovery time if he has a pain flareup — 1-2x a week to recover" — is too subjective and unpredictable to suffice.

¶ 2 Mr. Covington opposes State Fund's motion but does not cross move for summary judgment.

¶ 3 After an in-person hearing and supplemental briefing, State Fund's motion was submitted.

¶ 4 The following week, the parties participated in a Pretrial Conference, during which they indicated that the issues to be determined at trial, depending on the outcome of State Fund's pending Motion for Summary Judgment, included Mr. Covington's entitlement to TPD benefits, costs, penalties, and attorney fees.

¶ 5 Several days later, on May 2, 2025, the Workers' Compensation Court (WCC) issued an Order Denying State Fund's Motion for Summary Judgment. In the order, the Court explained that:

> ¶ 5a Mr. Covington's medical records satisfied the requirements in § 39-71-712(1), MCA, that he have a "physical restriction" and be approved to "return to a modified or alternative employment," and
>
> ¶ 5b because trial was imminent, it issued a short order to give the parties as much notice as possible but would issue a full opinion in due course.

¶ 6 On May 6, 2025, pursuant to an unopposed motion filed by Mr. Covington, this Court issued an order vacating the trial date.

¶ 7 On May 21, 2025, Mr. Covington filed a Joint Petition for Approval of Stipulated, Limited-Issue Settlement Agreement, which the parties "predicated on the Court's order denying Respondent's motion for summary judgment and . . . entered into in anticipation of receipt of the Court's forthcoming full Opinion regarding its order denying Respondent's motion for summary judgment."

¶ 8 What follows here is the "full opinion" that this Court referenced in its May 2, 2025, Order Denying State Fund's Motion for Summary Judgment and that the parties referenced in their May 21, 2025, Joint Petition for Approval of Stipulated, Limited-Issue Settlement Agreement.

FACTS

¶ 9 Mr. Covington suffered an industrial injury on July 22, 2020.

¶ 10 At the time, he was a Fire Marshal with Evergreen Fire District.

¶ 11 State Fund accepted liability for Covington's injury claim for his right neck, his right shoulder, and bilateral hand paresthesia, and paid medical benefits.

¶ 12 For a time, Mr. Covington went back to his time-of-injury job, full duty, without restrictions.

¶ 13 The earliest medical record provided in the Summary Judgment Record is from December 2, 2022. On that date, Mr. Covington saw Michelle L. Johnson, PA-C, at Primary Care – Burns Way East, to establish care regarding his right shoulder, which he reported hurting two years prior in a workers' compensation injury. Mr. Covington reported longstanding right-shoulder and neck and back pain that was worsening. On examination, he had full range of motion and strength in his right shoulder and upper extremities. PA Johnson ordered neck and shoulder X-rays.

¶ 14 The same day, December 2, 2022, Mr. Covington had the X-rays at Logan Health Medical Center (Logan Health), with no abnormalities detected.

¶ 15 On January 12, 2023, Mr. Covington returned to Logan Health for MRIs ordered by PA Johnson. An MRI of his right shoulder showed "Mild AC arthrosis." And an MRI of his cervical spine showed "Mild cervical spondylosis."

¶ 16 On February 13, 2023, Mr. Covington had a Physical Medicine Rehab visit with Justin L. Shobe, PA-C, at Logan Health at PA Johnson's request. Mr. Covington reported that he had had an injury to his right shoulder several years prior, had experienced persistent pain since, but had "continue[d] to work full-time without any restrictions on his lifting." PA Shobe noted, "The pain is typically only worsened after significant exertion or prolonged activity, patient states that he is able to perform all duties unrestricted currently. He is primarily interested in reducing his pain with these activities." On examination, PA Shobe documented right-shoulder and right-sided C-spine range-of-motion deficits. PA Shobe noted, "I did provide an updated medical status form indicating that the patient is unrestricted from his normal duties. We will adjust this if the pain becomes more severe or if there is concern for the safety of the patient, his coworkers . . . at work."

¶ 17 On February 14, 2023, PA Shobe responded to questions posed by State Fund. In response to the question, "What is your diagnosis of Benjamin W. Covington's current condition? Provide the objective medical findings supporting this diagnosis," PA Shobe wrote, "R Neck Pain, R Shoulder Pain, . . . Increased R – C-Spine Restriction, pain on Right Shoulder w/ AROM (Extension) and Lift-off Test." And in response to the question, "For each diagnosis, please indicate what is the major contributing cause of the diagnosis as compared to all other causes. Please provide an explanation of your conclusions," PA Shobe wrote, "R Shoulder/Neck pain initially reported in July 2022 when donning SCBA. This pain flares up w/ normal work duties but has not prevented his ability to work."

¶ 18 On June 5, 2023, Mr. Covington returned to see PA Shobe for an ultrasound-guided right-shoulder injection.

¶ 19 On July 31, 2023, Mr. Covington returned to see PA Shobe. He reported moderate improvement in his right-shoulder pain after the right-shoulder injection on his last visit

but that the pain had returned with some activities. On examination, PA Shobe noted some range-of-motion deficits.

¶ 20 On April 23, 2024, Mr. Covington returned to see PA Johnson. He reminded her that, at this point, he had hurt his shoulder about three years prior and had had right-shoulder and neck pain since, and, although he had been cleared to return to work, he continued to struggle with pain. PA Johnson noted, "He states he is able to do his job however if he has a heavy duty day then he has a flareup the next day and is in pain and unable to sleep." PA Johnson also documented that she "wrote him a note for work stating he should be allowed 1 to 2 days off a week if he does have a pain flare." On the Medical Status Form for this visit, in the section titled "Released for Work?" PA Johnson put an "X" in the box next to "Employee May Work Limited Hours" and listed the date range from "4/2024" to "4/2025." In the section of the form titled "Modified Work Abilities," under the heading "List Other Restrictions," PA Johnson first set forth that Mr. Covington: "Needs ample recovery time if he has a pain flareup – 1-2x a week to recover."

¶ 21 On July 3, 2024, Mr. Covington saw Thomas McClure, MD, at Logan Health Occupational Medicine, for an impairment rating**.** Dr. McClure noted that Mr. Covington continued at regular work but with pain he did not feel was sustainable. On examination, Dr. McClure observed some tightness, discomfort, and tenderness. Range-of-motion testing for the right shoulder revealed a handful of deficits, and several provocative tests were positive while several others were borderline. Dr. McClure diagnosed Mr. Covington with cervicalgia, pain in the right shoulder, and impingement syndrome of the right shoulder. Dr. McClure described Mr. Covington as a credible historian. In addition to requesting an orthopedic evaluation for Mr. Covington's right shoulder, Dr. McClure documented a plan of care, consisting in part, of:

> Continue regular work with the current arrangement of being able to take time off for flareups, although it is not clear if that is sustainable long-term. The FCE performed 8/16/2023, nearly 1 year prior to presentation, revealed a lifting capacity of up to 140 pounds, which would meet the lifting requirements stated in the JA. This of course does not account for repetitive motions, pushing or pulling, etc.

¶ 22 On the Medical Status Form Dr. McClure filled out the same date, July 3, 2024, he released Mr. Covington to full duty but under "List Other Restrictions," wrote "Restrictions as written by PCP allow for recovery up to 2 days/wk."

¶ 23 On July 10, 2024, Genex Services, LLC, sent a Physician's Response to Time of Injury JA to Dr. McClure to fill out. Dr. McClure checked the box next to "Yes – Benjamin Covington can return to his time of injury job as outlined in the Time of Injury Job Analysis." However, on the lines provided below the "No" answer, Dr. McClure explained, "Mr. Covington can self-protect to some extent. He has some pending issues, including an ortho referral for the shoulder which may impact the final determination."

¶ 24 On August 2, 2024, on referral by Dr. McClure, orthopedic surgeon Benjamin Ward, MD, examined Mr. Covington for ongoing right-shoulder issues. Dr. Ward noted rotator-cuff weakness, tenderness in some areas, and a positive O'Brien's test but recommended no further interventions. Dr. Ward signed a Medical Status Form where he put an "X" in the box next to "Employee Released to Full Duty" as of "8/2/24."

¶ 25 On September 12, 2024, State Fund sent Dr. McClure a letter asking, "Do you concur with Dr. Ward's release to full duty?" Dr. McClure responded on September 17, 2024, by checking "Yes" but writing next to the question, "Needs to take time off as needed."

¶ 26 At an examination with Dr. McClure on January 27, 2025, for increasing right-shoulder pain and mild persistent neck pain, Mr. Covington's right-shoulder range-of-motion testing still revealed some deficits, and although his provocative test results were improved, several remained positive and borderline. Among other things, Dr. McClure requested a right-shoulder MRI with arthrogram and set forth:

> Mr. Covington states he has no formal restrictions, although due to periods of increased pain following heavy work exposures he has to take unscheduled days off for pain management. . . . Continue the same work status which does not have specific restrictions other than allowing for days off with significantly increased symptoms.

On Dr. McClure's Medical Status Form from the same day, January 27, 2025, he checked the box next to "Employee Released to Full Duty," but under the heading "List Other Restrictions" wrote, "Restrictions – allow for recovery up to 2 days/wk."

¶ 27 On January 17, 2025, State Fund sent Dr. McClure a letter asking him to "review the enclosed time of injury job analysis and opine if Mr. Covington is able to return to his time of injury job." In his response dated February 5, 2025, Dr. McClure put a checkmark on the line next to "Yes. Mr. Covington can return to his time of injury job as outlined in the Time of [I]njury Job Analysis." However, among other comments, Dr. McClure then wrote in "(With allowance for 'rest days' for increased symptoms)."

¶ 28 Mr. Covington had the right-shoulder MRI and arthrogram on February 13, 2025.

¶ 29 On February 26, 2025, Mr. Covington returned to see Dr. McClure. Mr. Covington had a better range of motion but more positive provocative signs. After reviewing the MRI report, which concluded Mr. Covington may have a partially detached labrum, Dr. McClure diagnosed him with "Superior glenoid labrum lesion of right shoulder." Dr. McClure noted "We again reviewed his work status which [he] states is fine as is, with no formal restrictions other than the need to take time off occasionally for flareups." Dr. McClure's "Plan of Care" included "Continue regular work with the above allowance for time off as necessary."

¶ 30 On Dr. McClure's Medical Status Form for that day, February 26, 2025, he released Mr. Covington to full duty but noted under "List Other Restrictions:" "May need up to to [sic] 2 days off as necessary for flare-ups."

¶ 31 Although the letter is undated, Fire Chief Craig Williams has provided a letter indicating that, "The Evergreen Fire District," which is Mr. Covington's employer, "will grant Ben Covington the necessary time off as indicated by his doctor's note."

LAW AND ANALYSIS

¶ 32 This case is governed by the 2019 version of the Montana Workers' Compensation Act because that was the law in effect at the time of Mr. Covington's injury.[1]

¶ 33 To prevail on a motion for summary judgment, the moving party must meet its initial burden of showing the "absence of a genuine issue of material fact and entitlement to judgment as a matter of law."[2] "[If] the moving party meets its initial burden to show the absence of a genuine issue of fact and entitlement to judgment, the burden shifts to the party opposing summary judgment either to show a triable issue of fact or to show why the undisputed facts do not entitle the moving party to judgment."[3]

¶ 34 State Fund argues that the restriction imposed by Mr. Covington's medical providers is not a "medically determined physical restriction" under the TPD statutes for several reasons. The first reason is because neither the restriction nor anything else in the record indicates that Mr. Covington cannot physically perform the activities on the Medical Status Form and those that make up his time-of-injury position. The second reason is that the restriction is not objective: when, whether, and for how long the restriction is needed is not based on objective medical findings, but rather, on Mr. Covington's subjective experience of his own pain. According to State Fund, this could lead to it having to pay benefits essentially at the say-so of claimants who unilaterally remove themselves from work whenever they deem it necessary. And the third reason is that the restriction is not predictable: how the restriction is executed each time is unpredictable in that "recovery" may mean different things at different times, e.g., one day instead of two.

¶ 35 Mr. Covington does not dispute that he can physically perform each activity that makes up his time-of-injury job or that his medical providers did not restrict other activities on the Medical Status Form. But he asserts that pain follows heavy-duty activity. And because pain is, in part, physical, a restriction designed to limit pain is a "physical

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[1] *Ford v. Sentry Cas. Co.*, 2012 MT 156, ¶ 32, 365 Mont. 405, 282 P.3d 687 (citation omitted); § 1-2-201, MCA.

[2] *Begger v. Mont. Health Network WC Ins. Trust*, 2019 MTWCC 7, ¶ 15 (citation omitted).

[3] *Richardson v. Indem. Ins. Co. of N. Am.*, 2018 MTWCC 16, ¶ 24 (alteration added) (citation omitted), *aff'd*, 2019 MT 160, 396 Mont. 325, 444 P.3d 1019.

restriction."[4] Mr. Covington also contends that the restriction his medical providers have given him is based on objective and subjective medical information, including physical examinations, imaging, responses to medication and other interventions, consistent reports of pain (especially following heavy-duty work), and expert opinions formed over several years of treatment. Finally, Mr. Covington likens his restriction to a basic hours-per-week restriction, which has been recognized by the courts as a "medically determined physical restriction."

¶ 36 The Court rephrases the issue presented as follows:

> On the record, has State Fund established that Mr. Covington does not have a "medically determined physical restriction" for purposes of the TPD statutes?

¶ 37 Section 39-71-712(1), MCA, provides, in pertinent part:

> [I]f prior to maximum healing an injured worker ***has a physical restriction and is approved to return to a modified or alternative employment*** that the worker is able and qualified to perform and the worker suffers an actual wage loss as a result of a temporary work restriction, the worker qualifies for temporary partial disability benefits.[5]

Section 39-71-116(37), MCA, defines "temporary partial disability" as:

> [A] physical condition resulting from an injury, as defined in 39-71-119, in which a worker, prior to maximum healing:
>
> (a) is temporarily unable to return to the position held at the time of injury because of a ***medically determined physical restriction***;
>
> (b) returns to work in a modified or alternative employment; and
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> (c) suffers a partial wage loss.[6]

¶ 38 Notably, the Workers' Compensation Act's definition statute, § 39-71-116, MCA, did not define the term "medically determined physical restriction" or any part of it in 2019

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[4] *See Key v. Liberty Nw. Ins.*, 2001 MTWCC 53, ¶ 33 ("[P]ain has both physiologic and mental components. Pain receptors are physical parts of the body and are necessary to the sensation of pain. Treatment which significantly reduces or controls pain, and thereby increases mobility, endurance, strength, alertness, and overall functioning is treatment which will materially improve a claimant's condition.").

[5] Emphases added.

[6] Emphases added.

nor does it today. In the absence of statutory definitions,[7] where the words of the statute are clear and unambiguous,[8] a court interprets the statute by the plain meaning of the words used.[9]

¶ 39 Neither the Montana Supreme Court nor this Court have specifically defined the term "medically determined physical restriction," although they have casually referred, without analysis, to examples. For instance, the Supreme Court[10] has referred to the following as physical restrictions: Do not "lift heavy objects,"[11] "minimize continuous twisting or bending of the neck,"[12] and "perform primarily sedentary job duties."[13]

¶ 40 According to their dictionary definitions, the relevant words in the term mean as follows:

- "Medically" means "in a way that is connected with medicine and the treatment of illness and injury."[14]
- "Determined" means something that has been "officially decide[d] and/or arrange[d]."[15]
- "Physical" means "[o]f, relating to, or involving someone's body as opposed to mind,"[16] or "[r]elating to things perceived through the senses as opposed to the mind."[17]

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[7] *Spoklie v. Mont. Dept. of Fish, Wildlife & Parks*, 2002 MT 228, ¶ 25, 311 Mont. 427, 56 P.3d 349; § 1-2-101, MCA.

[8] *State, Dept. of Corrections v. Phelps*, 2000 MT 18, ¶ 11, 298 Mont. 135, 995 P.2d 963.

[9] *Duck Inn, Inc. v. Mont. State Univ.-Northern*, 285 Mont. 519, 523, 949 P.2d 1179, 1181 (1997).

[10] *See, e.g.*, *Ford v. Sentry Cas. Ins.* (*Ford* (SCOMT)), 2012 MT 156, ¶ 61, 365 Mont. 405, 282 P.3d 687 (albeit in a case in which the issue was different, i.e., the claimant's entitlement to temporary total disability benefits under § 39-71-701, MCA (2007), which specifically required that, "[t]he determination of temporary total disability must be supported by a preponderance of objective medical findings").

[11] *Ford* (SCOMT), ¶ 63.

[12] *Ford* (SCOMT), ¶ 63 & incorporating *Ford v. Sentry Cas. Co.* (*Ford* (WCC)), 2011 MTWCC 19, ¶ 15 (citation omitted).

[13] *Ford* (WCC), 2011 MTWCC 19, ¶ 15 (citation omitted), incorporated by *Ford* (SCOMT), ¶ 63.

[14] *Medically*, OXFORD LEARNER'S DICTIONARY, https://www.oxfordlearnersdictionaries.com/us/definition/english/medically. Accessed May 27, 2025.; *see also Weis v. Div. of Work. Comp. of Dept. of Labor & Industry*, 232 Mont. 218, 221, 755 P.2d 1385, 1387 (1988) (defining "medical" from another dictionary and holding that workers' compensation statutes restricted making of impairment ratings to licensed medical physicians because impairment ratings were "medical determinations.")

[15] *Determine*, OXFORD LEARNER'S DICTIONARY, http://oxfordlearnersdictionaries.com/definition/english/determine. Accessed May 27, 2025.

[16] *Physical*, BLACK'S LAW DICTIONARY (12th ed. 2024).

[17] *Physical*, OXFORD ENGLISH DICTIONARY, https://www.bing.com/search?q=define+physical&FORM=DCTSRC. Accessed June 18, 2025.

- "Restriction" means "[c]onfinement within bounds or limits; a limitation or qualification,"[18] or "an official limit on something . . . the act of putting a limit or control on something."[19]

¶ 41 Putting these definitions together, the plain meaning of "medically determined physical restriction" is something to the effect of:

a) an official limitation,

b) that has been decided,

c) in connection with the practice of medicine, and

d) relates to or involves a person's body.

¶ 42 Again, Mr. Covington's restriction is: "Needs ample recovery time if he has a pain flareup — 1-2x a week to recover." This is a limitation because it confines the number of hours that Mr. Covington may work per week, specifically on the day, or two days, after he engages in heavy-duty activities. The limitation is official because it appears throughout Mr. Covington's medical records, on numerous official forms,[20] and in a note provided to Mr. Covington's employer.

¶ 43 Mr. Covington's restriction has also, somewhat obviously, already been decided. If it had not been decided, it would not appear in Mr. Covington's medical records, on the official forms, and in a work note. Moreover, if it had not been decided, Mr. Covington would not utilize the restriction, but he does.

¶ 44 Mr. Covington's restriction is in connection with the practice of medicine because PA Johnson and Dr. McClure, each of whom this Court infers has relied on their care and treatment of Mr. Covington, as well as their professional knowledge and experience, in their respective decisions to set and continue Mr. Covington's restriction.

¶ 45 Mr. Covington's restriction relates to or involves his body because the flareups he needs to recover from are flareups of pain in his body. And "pain" is defined as the "[p]hysical suffering or discomfort caused by illness or injury."[21]

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[18] *Restriction*, BLACK'S LAW DICTIONARY (12th ed. 2024).

[19] *Restriction*, CAMBRIDGE DICTIONARY, https://dictionary.cambridge.org/dictionary/english/restriction. Accessed May 27, 2025.

[20] On the Medical Status Forms, the restriction appears in the section of the form titled, "Modified Work Abilities," under the heading, "List Other Restrictions."

[21] *Pain*, OXFORD ENGLISH DICTIONARY, https://www.bing.com/search?q=define+pain&FORM=DCTSRC. Accessed June 18, 2025 (e.g., " 'she's in great pain,' 'chest pains,' 'those who suffer from back pain' "); MERRIAM-WEBSTER DICTIONARY, http://www.merriam-webster.com/dictionary/pain. Accessed May 27, 2025 ("a localized or generalized unpleasant bodily sensation or complex of sensations that causes mild to severe physical discomfort and emotional distress and typically results from bodily disorder); BLACK'S LAW DICTIONARY (12th ed. 2024), pain and

¶ 46 From a definitional standpoint, State Fund argues, without citation to authority, that since Mr. Covington can physically perform the activities listed on the Medical Status Form and that make up his time-of-injury job, he cannot have a physical restriction. A thorough discussion of this issue would exceed the narrow scope of the issue before this Court, because it would require a full analysis of the TPD statutes. However, for present purposes, State Fund's argument is incorrect for several reasons.

¶ 47 First, none of the words that make up the term "medically determined physical restriction" point this Court to particular activities that the employee must be incapable of performing in order to have a physical restriction. Each claimant will be able to engage in different activities depending on their unique circumstances. Mr. Covington does not dispute that he can physically perform each activity that makes up his time-of-injury job or others listed on the Medical Status Form. However, to some extent, the reason he may be able to do so as often as he does, despite his concern about sustainability, is because he has a restriction in place that allows him to physically recover the day or two following heavy-duty activities.

¶ 48 Second, Mr. Covington's restriction has always been communicated as a modified[22] work ability. The Medical Status Form has a section titled "Modified Work Abilities," that contains checkboxes next to a list of activities. Mr. Covington's medical providers did not use this area. However, the same section, "Modified Work Abilities," also contains an area for a medical provider to "List Other Restrictions," presumably, for those occasions when the restriction the provider wants to give the employee is not already listed on the form or written the way the provider prefers.[23] This is where Mr. Covington's medical providers have always written his restriction. Similar to a restriction that limits the number of times an employee can lift something heavy or twist or bend, Mr. Covington's restriction does not enable him to do a physical activity that he is otherwise unable to do; rather, it reduces — due to pain — the number of hours a week that he has to perform the physical activities that he is otherwise capable of performing.

¶ 49 Based on the foregoing, the record before this Court could support a conclusion that Mr. Covington has a "medically determined physical restriction" under that term's plain meaning. The undisputed facts do not establish that State Fund is entitled to judgment as a matter of law.

¶ 50 State Fund's additional arguments do not persuade this Court otherwise, because, as discussed below, case law shows that objective medical findings, objective triggers,

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suffering ("[p]hysical discomfort or emotional distress compensable as an element of noneconomic damages in torts. See Damages.").

[22] *Modified*, "[M]odified" means "ma[d]e more moderate or less sweeping"; "reduce[d] in degree or extent"; "limit[ed], qualif[ied], or moderate[d]." BLACK'S LAW DICTIONARY (12th ed. 2024), (second definition) (alterations added).

[23] For example, the "Released for Work?" section of the form contains a line on which to list hours-per-day restrictions.

and predictable executions are not required for a restriction to constitute a "medically determined physical restriction."

¶ 51 The parties cite this Court to only one case addressing the TPD statutes, *Hart v. Hartford Ins. Co. of the Midwest*.[24] That case involves the 2005 TPD statutes, which read the same as the 2019 versions applicable to Mr. Covington.[25] In *Hart*, after his injury, the Petitioner was restricted to light duty from November 20, 2006, through December 29, 2008.[26] During that period, his employer had light-duty work available, which the Petitioner accepted.[27] Despite the availability of work within his restrictions, the Petitioner missed periods of work due to "back pain."[28] The WCC ruled that the Petitioner was not entitled to temporary total disability (TTD) benefits during this time, because § 39-71-701, MCA, required that a determination of TTD be supported by a preponderance of objective medical findings and no physician had removed the Petitioner from work entirely.[29]

¶ 52 However, on December 30, 2008, the Petitioner's medical provider restricted his workday to five hours maximum with the possibility that he might not be able to work at all on some days, and no lifting.[30] To be temporarily partially disabled required the Petitioner to have a "medically determined physical restriction."[31] The WCC ruled that, except for approximately one week that the Petitioner missed for vacation, he was entitled to TPD benefits effective December 30, 2008.[32]

¶ 53 Unsurprisingly, State Fund and Mr. Covington dispute the relevance of the *Hart* case, with each side claiming it supports their position. According to State Fund, the Petitioner's TTD and TPD entitlements were determined by reference to his medical restrictions and the availability of work within those restrictions. State Fund argues that the Petitioner's claim that he was in too much pain to work was irrelevant without objective medical support and that he was not entitled to any benefits until he had a "medically determined physical restriction" like "no lifting" and the same is true of Mr. Covington.

¶ 54 Mr. Covington, on the other hand, draws comparisons between the restrictions that qualified the Petitioner for TPD benefits — workdays limited to five hours maximum with the possibility that he might not be able to work at all on some days — and his own restriction. Mr. Covington argues that both types of restrictions acknowledge the reality

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[24] 2010 MTWCC 8.

[25] *See Hart*, ¶ 7.

[26] *Hart*, ¶¶ 26, 64.

[27] *Hart*, ¶ 64.

[28] *Hart*, ¶ 60.

[29] *Hart*, ¶¶ 59, 60.

[30] *Hart*, ¶¶ 49, 64.

[31] § 39-71-116(33)(a), MCA (2005).

[32] *Hart*, ¶ 64.

that a worker's physical condition fluctuates and allow time for recovery when pain becomes a barrier to the employee's ability to work.

¶ 55 *Hart* appears to have limited utility for present purposes. ***The Petitioner did not satisfy the TTD statutes, which explicitly require objective medical support***, when all he had was absences based on his subjective beliefs about his pain. ***But the Petitioner did satisfy the TPD statutes, which do not explicitly require objective medical support***, when he had a partly subjective five-hours-max-and-sometimes-none workday restriction and an objective lifting restriction. State Fund argues that the TPD statutes requires objective medical findings just like the TTD statutes do, and thus, that it was the lifting restriction, not the five-hours-max-and-sometimes-none, workday restriction, that constituted the "medically determined physical restriction" and entitled the Petitioner to TPD benefits.

¶ 56 Whether purposeful or not, State Fund is commingling the concepts of "objective medical findings" and "objective restrictions." As a result, it is not clear to this Court which it is arguing is the problem with Mr. Covington's restriction. As a result, this Court deals briefly with both.

Objective Medical Findings

¶ 57 A "medically determined physical restriction" does not need to be supported by objective medical findings. A court's "task in interpreting statutes is simply to ascertain and declare what is in terms or in substance contained therein, not to insert what has been omitted, or to omit what has been inserted."[33] The TPD statutes clearly do not say that objective medical findings are required. Moreover, if the Legislature had intended the requirements for TPD benefits to be established by objective medical findings, and not exclusively on complaints of pain for that matter, it knew how to indicate that as demonstrated by its use of those specific words in different provisions of the Workers' Compensation Act.[34] When the Legislature does not use identical language in different provisions of a statute, it is proper to assume that it intended a different meaning.[35]

¶ 58 That a "medically determined physical restriction" need not be supported by objective medical findings is buoyed by the permanent partial disability (PPD) case,

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[33] § 1-2-101, MCA; *State v. Johnson*, 2012 MT 101, ¶ 19, 365 Mont. 56, 277 P.3d 1232 (citations omitted).

[34] For example, in 1995, the Legislature replaced the PPD definition's requirement that the worker has a "***medically determined physical restriction*** as a result of injury" with "(a) has a permanent impairment ***established by objective medical findings***." § 39-71-116(22)(a), MCA (emphases added). And in 2011, the Legislature revised the requirement again to read "(a) has a permanent impairment, as determined by the sixth edition of the American medical association's Guides to the Evaluation of Permanent Impairment, that is established by objective medical findings for the ratable condition. The ratable condition must be a direct result of the compensable injury or occupational disease and ***may not be based exclusively on complaints of pain.***" § 39-71-116(27)(a), MCA (emphases added).

[35] *See Shepherd v. State ex rel. Department of Corrections*, 2021 MT 70, ¶ 17, 403 Mont. 425, 483 P.3d 518 (citations omitted).

Nielson v. State Compensation Ins. Fund.[36] In *Nielson*,[37] the Petitioner sought PPD benefits for a right-arm injury under the 1993 statute.[38] In sum:

> The Workers' Compensation Court found that the issue of whether [the Petitioner] had a [medically determined] physical restriction as a result of injury which impaired his ability to work depended solely on [the Petitioner's] credibility regarding his complaints of pain and that it did not find those complaints credible. The court found no persuasive objective medical evidence of an injury that would impair [the Petitioner's] ability to work. On the other hand, the court found [one outlying physician's] testimony credible and persuasive. On that basis, it concluded that [the Petitioner] was not permanently partially disabled as defined at § 39–71–116(18), MCA (1993), and that he was not entitled to partial disability benefits pursuant to § 39-72-703, MCA (1993).[39]

¶ 59 On appeal, the Montana Supreme Court reversed and remanded, stating:

> Without meaning to infer that objective evidence is always necessary or even available for diagnosis of an injury, we conclude that the Workers' Compensation Court erred when it found no objective evidence of physical restrictions which impair [the Petitioner's] ability to work.[40]

The Supreme Court explained that ten physicians, an exercise physiologist, and a physical therapist had examined the Petitioner, and all but one doctor diagnosed some form of injury.[41] Multiple doctors had observed objective signs of injury.[42] The Petitioner's treating physician testified that his complaints were consistent with his diagnosis.[43] The functional capacity evaluation (FCE) evaluators concluded that the Petitioner was unable to return to his time-of-injury employment and had physical limitations on his ability to work.[44] The only doctor to opine that the Petitioner had no physical restriction impairing his ability to work was the same one who had found no injury.[45] That doctor initially stated he required a current FCE to make a representation about the Petitioner's return to work

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[36] (*Nielson* (Appeal)), 2003 MT 95, 315 Mont. 194, 69 P.3d 1136 (applying 1993 PPD statute).

[37] 2000 MTWCC 64 (WCC case) (applying 1993 PPD statute), *rev'd & remanded by* 2003 MT 95, 315 Mont. 194, 69 P.3d 1136.

[38] *Nielson* (WCC case), ¶¶ 1, 3.

[39] *Nielson* (Appeal), ¶ 35.

[40] *Nielson* (Appeal), ¶ 45.

[41] *Nielson* (Appeal), ¶ 46.

[42] *Nielson* (Appeal), ¶ 46.

[43] *Nielson* (Appeal), ¶ 46.

[44] *Nielson* (Appeal), ¶ 46.

[45] *Nielson* (Appeal), ¶ 47.

but then represented that the Petitioner could return to work despite the only FCE report in existence at the time concluding the opposite.[46]

¶ 60 In *Nielson*, then, the Supreme Court made it clear that, at least under versions of the PPD statute in which there was no explicit requirement for it (i.e., until the 1995 version), objective evidence was not always necessary or available to demonstrate that a worker had a "medically determined physical restriction." Because the TPD statute does not explicitly require objective evidence either, the Supreme Court's decision in *Nielson* is persuasive here. Although Mr. Covington's medical providers include objective findings in their records, most recently, MRI findings of a "superior glenoid labrum lesion of the right shoulder," such findings are not necessary to demonstrate that he has a "medically determined physical restriction" under *Nielson*.

Objectivity of Restrictions

¶ 61 In *Chaffey v. Liberty Mutual Fire Ins. Co.*,[47] and *Williams v. Plum Creek Timber Co.*,[48] two other PPD cases that required a "medically determined physical restriction," and are, therefore, persuasive here, an injured worker was ultimately entitled to PPD benefits where the "medically determined physical restriction" was a limitation on work based on subjective pain and discomfort, not objective circumstances.

¶ 62 In the WCC case of *Chaffey*, the Petitioner was a truck-driver.[49] Prior to his injury, he worked five ten-hour days a week; with overtime, he averaged a 55-hour work week.[50] After an industrial injury involving his back, treatment, surgery, recovery, and the recurrence of pain, the Petitioner's doctor medically restricted the Petitioner to driving 45 hours a week.[51]

¶ 63 The doctor testified that the way he arrived at the 45-hour suggested limitation on driving time was through conversations with the Petitioner;[52] basically, the Petitioner had told him he was "unable to work more than 45 [hours] per week without discomfort."[53] The doctor agreed it was a normal reaction for a heavy hauler after surgery[54] and that the sitting position can become easily aggravated for a truck driver post-operatively because the interspace at the level where the disc has been removed narrows and produces facet

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[46] *Nielson* (Appeal), ¶ 47.

[47] WCC No. 9211-6627 (1994), available at 1994 WL 148752 (applying 1989 PPD statute).

[48] 270 Mont. 209, 891 P.2d 502 (1995) (applying 1991 PPD statute).

[49] *Chaffey*, at * 1.

[50] *Chaffey*, at * 1.

[51] *Chaffey*, at ** 1, 6.

[52] *Chaffey*, at * 7.

[53] *Chaffey*, at * 7.

[54] *Chaffey*, at * 7.

impingement secondary to settling.[55] Notwithstanding that the Petitioner had been able to drive more than 45 hours a week on several occasions without injuring himself, the doctor did not think it was good for him physically[56] and did not expect the Petitioner's condition to improve to the point where he would increase his driving time above 45 hours a week.[57]

¶ 64 Although the issue for the WCC was not what constituted a "medically determined physical restriction" for PPD purposes, this Court took for granted that a restriction on driving time, which the Petitioner essentially came up with himself based on his own discomfort, and that his doctor agreed with and simply reiterated, was a "medically determined physical restriction" under the 1989 PPD statute. Similar to the Petitioner in *Chaffey*, Mr. Covington had a big hand in coming up with his restriction based on his own pain, at least insofar as he told PA Johnson that "he is able to do his job however if he has a heavy duty day then he has a flareup the next day and is in pain and unable to sleep." Although his restriction is based on his subjective experience, an objective trigger is not required under *Chaffey*.

¶ 65 In *Williams v. Plum Creek Timber Co.*,[58] the Petitioner injured his left foot while in the course and scope of his employment and suffered the partial amputation of one toe and the deformity of another. The Petitioner's doctor released him to work without specifically assigning him any restrictions but noted, and testified, that "cold temperatures cause [the Petitioner's] toes and foot to ache and that [the Petitioner] will, therefore, have difficulty working in very cold environments for prolonged periods of time."[59] The doctor further testified that the Petitioner's complaints about pain and the cold were consistent with his injury. Basing its decision on the doctor's testimony, the WCC determined that the Petitioner had a "medically determined physical restriction" and met the definition of PPD.

¶ 66 On appeal, the Supreme Court affirmed the WCC, holding that the Petitioner in *Williams* met the definition of PPD. This demonstrates that evidence that a worker would have difficulty working under certain circumstances because of pain has been recognized as a "medically determined physical restriction."[60]

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[55] *Chaffey*, at * 7.

[56] *Chaffey*, at * 7

[57] *Chaffey*, at * 7.

[58] *Williams v. Plum Creek Timber Co.*, 1994 MTWCC 59, *aff'd,* 270 Mont. 209, 215, 891 P.2d 502, 506 (1995).

[59] *Williams*, 270 Mont. at 214, 891 P.2d at 505.

[60] *Compare* the 1991 PPD definition statute at issue in *Williams with* the 2011 PPD definition statute, in which the Legislature added the requirement that a worker have "a permanent impairment, as determined by the sixth edition of the American medical association's Guides to the Evaluation of Permanent Impairment, that is established by objective medical findings for the ratable condition. The ratable condition must be a direct result of the compensable injury or occupational disease and ***may not be based exclusively on complaints of pain***. (Emphases added).

¶ 67 Although the *Williams* case is not on all-fours with Mr. Covington's, it is similar in terms of the restrictions' triggers. While there may be objective components to the restriction in *Williams*, such as the temperature or elapsed time, unmoored from the Petitioner's subjective experience, neither measure has any meaning. Nor would something like industry-specific definitions for a "very cold" environment or a "prolonged period." This is because only the Petitioner could answer when his pain began, and thus, how cold was too cold and how long was too long. Mr. Covington's restriction is based on his pain, as well. Although only he can answer when, whether, and for how long (one or two days) his restriction is needed, an objective trigger is not required under *Williams*.

¶ 68 In the Montana Supreme Court permanent total disability (PTD) case, *Killoy v. Reliance National Indemnity*,[61] the statute did not require a "medically determined physical restriction." However, the Supreme Court's consideration of subjective pain as a factor in reaching its determination of disability is instructive for present purposes.

¶ 69 In *Killoy*, the Petitioner filed a petition for hearing regarding his entitlement to PTD benefits after an industrial neck injury.[62] Doctor 1 testified that the Petitioner's response to his neck injury was appropriate, and that the Petitioner was not at risk of further injury with other employment but would have to determine for himself whether he could perform the jobs based on his ability to tolerate the pain associated with them.[63] Doctor 2's records documented his beliefs that the Petitioner had chronic neck pain, that after a re-aggravation, he did not think the Petitioner would be able to return to his regular job, and that sometimes slight bumps markedly aggravated his condition.[64] The Petitioner testified that he had headaches and muscle spasms, and constant pain from his skull through his shoulders, the severity of which varied with activity.[65] The Petitioner testified that he found temporary relief from stretching but, on bad days, sought relief through showers and a heating pad.[66]

¶ 70 This Court pointed out that "pain is only one factor to be considered when reaching a determination of disability . . . [and] may be so severe for some individuals that it renders them physically incapable of performing their job duties."[67] Nevertheless, this Court was not persuaded that the Petitioner's pain was so bad that he would have no reasonable prospect of physically performing regular employment and, accordingly, ruled that the Petitioner was not permanently totally disabled.[68] In an order denying the Petitioner's

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[61] 278 Mont. 88, 923 P.2d 531 (1996) (applying 1993 PTD statute).

[62] *Killoy*, 278 Mont. at 90, 92, 923 P.2d at 532, 533.

[63] *Killoy*, 278 Mont. at 94-95, 923 P.2d at 535.

[64] *Killoy*, 278 Mont. at 95, 923 P.2d at 535.

[65] *Killoy*, 278 Mont. at 91, 923 P.2d at 533.

[66] *Killoy*, 278 Mont. at 91, 923 P.2d at 533.

[67] *Killoy*, 278 Mont. at 94, 923 P.2d at 534-35.

[68] *Killoy*, 278 Mont. at 94, 923 P.2d at 534.

motion for rehearing, the WCC expressed concerns that "because pain is subjective, [Petitioners] would unilaterally determine that they cannot work."[69]

¶ 71 The Petitioner appealed and the Supreme Court reversed and remanded, holding that in the Petitioner's case, there was not substantial credible evidence to support a finding that the Petitioner had a reasonable prospect of physically performing regular employment. Rather, the Supreme Court concluded that the "uncontroverted testimony presented at trial support[ed] a finding that [Petitioner] [wa]s unable to perform at any of the suggested positions without experiencing substantial pain."[70]

¶ 72 As to the WCC's concerns about claimants making unilateral determinations that they cannot work, the Supreme Court stated, "That may or may not be the case but that is not the situation here. [The Petitioner's] testimony was corroborated by medical evidence offered by both [Doctor 1] and [Doctor 2]. Furthermore, [the Petitioner's] testimony regarding his pain was found to be credible by both [Doctor 1] and the court."[71]

¶ 73 Here, it is State Fund raising the concern that because pain is subjective, claimants like Mr. Covington would ultimately determine that they could not work. As the Supreme Court stated in *Killoy*, that may or may not be the case, but that is not the situation here. Dr. McClure's medical records contain objective findings, which corroborate Mr. Covington's pain complaints and Dr. McClure's opinion that Mr. Covington is a credible historian. Mr. Covington's work records demonstrate that he has not abused his restriction, but rather, used it as intended — i.e., to continue at regular work; his employer remains willing to accommodate him. Moreover, there is no dispute between the parties that Mr. Covington's pain is legitimate.

Predictability of Restrictions

¶ 74 The *Williams* case, detailed above, is also similar to Mr. Covington's in terms of the restrictions' executions. As noted, because only he could determine when his pain began, it would be up to the Petitioner in *Williams* to determine when to flag the temperature of the environment as too cold, or the amount of time he had been working in it as too prolonged, to be comfortable. Notwithstanding the unpredictability inherent in that kind of power — e.g., the Petitioner could choose different temperatures or different amounts of time on different days or based on such factors as varied as whether he happened to be wearing sneakers or boots or drinking water or coffee — the Montana Supreme Court did not have a problem with it. Similarly, Mr. Covington may not execute his restriction the same way every time. For example, to recover from his flareups of pain, Mr. Covington may choose to take only one day off one week but two the next. And depending on when heavy-duty work is needed, his recovery days may fall on a different

[69] *Killoy*, 278 Mont. at 96, 923 P.2d at 535.

[70] *Killoy*, 278 Mont. at 96, 923 P.2d at 536.

[71] *Killoy*, 278 Mont. at 96, 923 P.2d at 535-36.

day or days each week. Although Mr. Covington's restriction can be executed in an unpredictable manner, predictability is not explicitly required under *Williams*.

¶ 75 Based on all of the foregoing, this Court concludes that State Fund has not established that Mr. Covington does not have a "medically determined physical restriction."

¶ 76 Accordingly, this Court enters the following:

ORDER

¶ 77 State Fund's Motion for Summary Judgment is **denied**.

DATED this 19th day of June, 2025.

(SEAL)

/s/ Lee Bruner
Judge Lee Bruner

c: Avery L. Field
Mark D. Meyer

Submitted: April 21, 2025