

IN THE WORKERS COMPENSATION COURT OF THE STATE OF MONTANA

2011 MTWCC 26

WCC No. 2011-2789

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**MACo WORKERS' COMPENSATION TRUST**

**Petitioner/Insurer**

**vs.**

**MARY BETH KLINKAM**

**Respondent.**

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FINDINGS OF FACT, CONCLUSIONS OF LAW AND JUDGMENT

**Summary:** Petitioner claims it is entitled to an offset pursuant to § 39-71-701(5), MCA, which provides that an insurer is entitled to an offset if the claimant collects social security disability payments “because of the injury” for which the claimant also receives workers’ compensation benefits.

**Held:** Respondent receives social security disability benefits for a multitude of reasons in addition to the knee injury for which she receives workers’ compensation benefits. Respondent’s knee injury was only one of eleven conditions considered severe by the Social Security Administration’s Administrative Law Judge in his determination that Respondent was entitled to benefits. Petitioner is not entitled to an offset.

¶ 1 The trial in this matter was held on November 2, 2011, in Kalispell, Montana. Petitioner MACo Workers’ Compensation Trust (MACo) was represented by Norman H. Grosfield. Respondent Mary Beth Klinkam was present and represented herself.

¶ 2 I addressed several matters before hearing testimony. Klinkam moved to admit certain mediation records. After discussion, I was satisfied that no allegations of noncooperation during the mediation process exist and that the parties had mediated the issue currently before this Court. I ruled that none of the exceptions contained in § 39-71-2411(8), MCA, applied and did not admit the mediation records.

¶ 3 Klinkam argued that the named respondent should include “and others so similarly situated” and that the caption should be changed to reflect this. I ruled that, at this juncture, a caption change would not be appropriate. However, Klinkam has preserved her right to seek common fund or class action status.

¶ 4 I denied Klinkam’s motion to dismiss for reasons stated on the record.

¶ 5 **Exhibits:** Exhibits 1-12, 14-16, 18, and 21 were admitted without objection. Exhibits 13, 17, 19, and 20 were admitted over Petitioner’s relevancy objections.

¶ 6 **Witnesses and Depositions:** Mary Beth Klinkam and Liz Krzan were sworn and testified at trial.

¶ 7 **Issues Presented:** The Pretrial Order sets forth the sole contested issue of law:<sup>1</sup>

Issue 1: Whether MACo is entitled to an offset against Klinkam’s receipt of social security disability benefits.

### **FINDINGS OF FACT**

¶ 8 Respondent Mary Beth Klinkam testified at trial. As it pertained to the sole issue before the Court, I found Klinkam’s testimony credible. Klinkam testified about a number of other issues which were not relevant to the issue before the Court. I make no finding regarding the credibility of that aspect of Klinkam’s testimony.

¶ 9 Klinkam injured her right knee on November 15, 2005, in the course and scope of her employment at the Lincoln County Works and Planning Office.<sup>2</sup> In March 2006, Stanley H. Makman, M.D., Klinkam’s treating orthopedist, determined that Klinkam had reached maximum medical improvement (MMI) with no permanent impairment and no work restrictions for her November 2005 knee injury.<sup>3</sup> Klinkam continued in the employ of Lincoln County until January 2008 when she was discharged for cause.<sup>4</sup> Beginning in May 2007, Dr. Makman began to treat Klinkam for continued knee pain, eventually performing a right full knee replacement on April 26, 2010.<sup>5</sup> MACo accepted liability for Klinkam’s injury and has paid temporary total disability benefits since April 30, 2010.<sup>6</sup>

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<sup>1</sup> Pretrial Order at 2, Docket Item No. 33.

<sup>2</sup> Trial Test.

<sup>3</sup> Ex. 2 at 3.

<sup>4</sup> Trial Test.

<sup>5</sup> Ex. 2 at 4-19; Ex. 3 at 3-4.

<sup>6</sup> Petition for Hearing, Docket Item No. 1 at 1.

On or about May 5, 2011, Dr. Makman placed Klinkam at MMI for her November 2005 knee injury and subsequent surgeries.<sup>7</sup>

¶ 10 On February 25, 2009, more than a year before her knee replacement, Klinkam filed a claim for social security disability benefits.<sup>8</sup> On May 26, 2010, a month after her knee replacement, Klinkam went to a social security hearing before an Administrative Law Judge (ALJ).<sup>9</sup> On June 8, 2010, the Office of Disability Adjudication and Review ruled that Klinkam had been disabled for social security disability purposes since November 8, 2007.<sup>10</sup> Klinkam's first entitlement to monthly social security payments was May 2008.<sup>11</sup>

¶ 11 The social security decision contained a lengthy analysis and thorough discussion of Klinkam's medical issues that contributed to the ALJ's determination that she is entitled to social security disability payments. Klinkam was described as having the following "severe impairments" that contributed to the ALJ's decision:

multi-level lumbar degenerative disc disease, systemic lupus erythematosus, hypertension, supra-ventricular tachycardia (SVT) with palpitations, generalized anxiety disorder, depression, personality disorder, fibromyalgia, migraine headaches, diabetes mellitus II, and osteoarthritis of the right knee . . . .<sup>12</sup>

¶ 12 In determining that Klinkam was entitled to social security disability benefits, the ALJ placed "great weight" on the "treatment records and opinion of the claimant's treating orthopedist, Dr. Makman."<sup>13</sup> The ALJ placed "significant weight" on the opinion of neuropsychologist Kristy Farnsworth, Ph.D. and the written statements of Klinkam's brother John S. Klinkam, brother Craig Klinkam, daughter Stephanie Cherberg, and housekeeper Sue Kukus.<sup>14</sup> The ALJ placed "some weight" on the opinion of consulting

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<sup>7</sup> Ex. 5 at 1.

<sup>8</sup> Ex. 7 at 10.

<sup>9</sup> Ex. 7 at 1.

<sup>10</sup> Ex. 7 at 10.

<sup>11</sup> Ex. 8 at 1.

<sup>12</sup> Ex. 7 at 3-4.

<sup>13</sup> Ex. 7 at 8.

<sup>14</sup> Ex. 7 at 8.

psychiatrist Dr. Sterling, M.D., neuropsychologist Dr. Sheppard, Ph.D., and the state agency's physical and mental assessments.<sup>15</sup>

¶ 13 The ALJ concluded: "[T]he claimant's combination of physical and mental impairments precludes her ability to sustain competitive employment."<sup>16</sup>

¶ 14 On January 7, 2011, MACo, through its counsel, inquired whether Klinkam had become entitled to social security disability benefits.<sup>17</sup> In that letter, MACo informed Klinkam that under the Montana Workers' Compensation Act, if a claimant becomes entitled to social security disability benefits, the insurer is entitled to take a designated offset against social security disability payments.<sup>18</sup> On April 19, 2011, MACo informed Klinkam that its staff had been instructed to begin taking the offset beginning May 9, 2011.<sup>19</sup>

¶ 15 On May 4, 2011, Klinkam responded and objected to MACo's insistence on an offset, arguing that MACo had neither provided correct calculations to determine her weekly disability rate and alleged offset nor proven that her social security disability benefits are payable because of her workers' compensation injury.<sup>20</sup> On June 16, 2011, MACo wrote to Klinkam reasserting its entitlement to and a calculation of the offset to her social security payments.<sup>21</sup> On June 19, 2011, Klinkam responded and attached documentation supporting her purported weekly disability rate.<sup>22</sup>

¶ 16 On June 2, 2011, Klinkam contacted the Social Security Administration and informed them that she had a knee replacement impacting the medical issue of osteoarthritis of her right knee since her initial award of social security disability benefits.<sup>23</sup> On October 3, 2011, the Social Security Administration responded to Klinkam's June 2, 2011, letter and informed her that the evidence in her social security disability claim had been reviewed and that her disability was continuing despite her right knee replacement.<sup>24</sup>

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<sup>15</sup> Ex. 7 at 8-9.

<sup>16</sup> Ex. 7 at 8.

<sup>17</sup> Ex. 12.

<sup>18</sup> *Id.*

<sup>19</sup> Ex. 9.

<sup>20</sup> Ex. 14 at 2, 5.

<sup>21</sup> Ex. 13.

<sup>22</sup> Ex. 17.

<sup>23</sup> Ex. 18 at 1.

<sup>24</sup> Ex. 16 at 1.

¶ 17 Liz Krzan testified at trial. I found Krzan's testimony credible.

¶ 18 Krzan is Klinkam's claims examiner and has worked for MACo as a claims examiner for the past four years.<sup>25</sup> Krzan testified that she, along with her claims supervisor and MACo's legal counsel, reviewed Klinkam's social security decision and determined that significant importance was related to the knee injury.<sup>26</sup> Based on this determination, MACo felt that it was entitled to an offset.<sup>27</sup>

### **CONCLUSIONS OF LAW**

¶ 19 This case is governed by the 2005 version of the Montana Workers' Compensation Act since that was the law in effect at the time of Klinkam's initial workplace injury.<sup>28</sup>

#### **Issue 1: Whether MACo is entitled to an offset against Klinkam's receipt of social security disability benefits.**

¶ 20 Section 39-71-701(5), MCA, provides in pertinent part:

[I]n cases in which it is determined that periodic disability benefits granted by the Social Security Act are payable because of the injury, the weekly benefits payable under this section are reduced, but not below zero, by an amount equal, as nearly as practical, to one-half the federal periodic benefits for the week, which amount is to be calculated from the date of the disability social security entitlement.

¶ 21 In determining whether MACo is entitled to an offset, this Court must evaluate whether Klinkam's receipt of social security benefits is "because of the injury" for which she receives workers' compensation benefits. The application of the term "because of the injury" in this context is a question of first impression.

¶ 22 MACo argues that it is entitled to an offset because a significant part of the social security decision related to Klinkam's knee condition. I disagree. The ALJ cited a long list of conditions that affect Klinkam which collectively contributed to her entitlement to social security disability benefits. Klinkam's knee condition was just one of eleven "severe" physical and mental impairments that the ALJ determined contributed to her entitlement to social security disability. The ALJ concluded that a "combination of

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<sup>25</sup> Trial Test.

<sup>26</sup> *Id.*

<sup>27</sup> *Id.*

<sup>28</sup> *Buckman v. Montana Deaconness Hosp.*, 224 Mont. 318, 321, 730 P.2d 380, 382 (1986).

[Klinkam's] physical and mental impairments"<sup>29</sup> entitled her to social security disability benefits.

¶ 23 The evidence presented demonstrates that Klinkam suffers from a multitude of mental and physical maladies wholly unrelated to her knee injury. The ALJ found that it was a combination of these physical and mental impairments which entitled Klinkam to social security disability benefits. I therefore cannot conclude that Klinkam's receipt of social security disability benefits was "because of the injury" for which she is receiving workers' compensation benefits.

### **JUDGMENT**

¶ 24 MACo is **not** entitled to an offset of Klinkam's social security disability benefits.

¶ 25 Pursuant to ARM 24.5.348(2), this Judgment is certified as final and, for purposes of appeal, shall be considered as a notice of entry of judgment.

DATED in Helena, Montana, this 13<sup>th</sup> day of December, 2011.

(SEAL)

/s/ JAMES JEREMIAH SHEA  
JUDGE

c: Norman H. Grosfield  
Mary Beth Klinkam  
Submitted: November 2, 2011

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<sup>29</sup> Ex. 7 at 8.