

**IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA**

**2011 MTWCC 12**

**WCC No. 2010-2622**

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**KRISTEN NEWMAN**

**Petitioner**

**vs.**

**MONTANA STATE FUND**

**Respondent/Insurer.**

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**ORDER DENYING PETITIONER'S MOTION FOR  
PARTIAL SUMMARY JUDGMENT**

**Summary:** Petitioner moves for partial summary judgment on the issue of whether Respondent properly terminated her indemnity and medical benefits. Petitioner seeks judgment, as a matter of law, that Respondent acted without medical or legal basis when it terminated her medical benefits and refused to reinstate her indemnity and medical benefits. Respondent argues that factual disputes exist concerning whether Petitioner had reached maximum medical improvement before it terminated her benefits and whether any continuing treatment is causally related to Petitioner's industrial injury.

**Held:** Material factual disputes regarding Petitioner's MMI status preclude summary ruling. Petitioner's motion is therefore denied.

¶ 1 Petitioner Kristen Newman moves for partial summary judgment on the issue of whether Respondent Montana State Fund (State Fund) properly terminated Newman's indemnity and medical benefits. Newman seeks judgment, as a matter of law, that State Fund acted without medical or legal basis when it terminated Newman's medical benefits and refused to reinstate her indemnity and medical benefits.<sup>1</sup>

¶ 2 State Fund opposes Newman's motion, arguing that factual disputes exist concerning whether Newman had reached maximum medical improvement (MMI)

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<sup>1</sup> Motion for Partial Summary Judgment at 1.

before it terminated her benefits and whether any continuing treatment is causally related to her industrial injury.<sup>2</sup>

### STATEMENT OF FACTS<sup>3</sup>

¶ 3 On June 17, 2008, Newman suffered a compensable work-related injury when she was thrown from a Bobcat utility vehicle while working for the Montana Department of Fish, Wildlife & Parks.

¶ 4 Newman suffered injuries to her head, leg, and shoulder.

¶ 5 State Fund accepted the claim and has paid out some medical and indemnity benefits.

¶ 6 Newman treated with neurologist Vernon H. Kirk, M.D., and consulted with neuropsychologist Jeffrey M. Cory, Ph.D.

¶ 7 Dr. Cory evaluated Newman and recommended in his November 13, 2008, report that “continued treatment with her neurologist would appear advisable, including to coordinate her care with physical rehabilitation interventions. Cognitive rehabilitation with her speech therapist certainly could be helpful for ongoing support at this time. . . .”

¶ 8 Dr. Cory never specifically commented on whether Newman had reached MMI.<sup>4</sup>

¶ 9 After evaluating Newman on January 12, 2009, Dr. Kirk wrote, “I would defer to her treating psychiatrist and Dr. Cory in this regard. From the standpoint of neurological dysfunction she has now reached or is near maximum medical improvement.”

¶ 10 In the same January 12, 2009, letter from Dr. Kirk, this treating physician “strongly supported” Dr. Cory’s treatment recommendations and deferred to him on the question of whether Newman was healed from a “neurobehavioral standpoint.”

¶ 11 State Fund did not authorize any of the treatment recommended by Drs. Kirk or Cory.

¶ 12 Newman terminated her attorney on March 18, 2009.

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<sup>2</sup> Response to Motion for Partial Summary Judgment (Respondent’s Response Brief) at 4-5.

<sup>3</sup> Except as specifically noted, the Statement of Facts are taken from Petitioner’s Brief in Support of Motion for Partial Summary Judgment (Petitioner’s Opening Brief) at 2-3. (Internal citations, footnotes, and emphasis omitted.)

<sup>4</sup> Respondent’s Response Brief at 2.

¶ 13 Two months after Dr. Kirk wrote his January 12, 2009, note, and after Newman's previous attorney had withdrawn from the case, State Fund terminated indemnity benefits by letter dated March 24, 2009, and medical benefits by letter dated May 4, 2010. The March 24, 2009, letter stated, in pertinent part: "At this time based on medical findings of Dr. Kirk's report 1/12/09 we can no longer authorize medical treatment on this claim." The May 4, 2010, letter stated, in pertinent part: "Based on Dr. Cory's diagnoses and the fact Dr. Kirk agreed with Dr. Cory we are not paying any benefits at this time."

¶ 14 Dr. Kirk left Montana, and Newman's nurse practitioner Janet Winnie referred her to Dr. Sherry Reid.

¶ 15 Dr. Reid initially evaluated Newman on April 16, 2009. Dr. Reid referred Newman to Cathy Fisher for cognitive speech therapy, Michele Rosen for visual occupational therapy, to the Rheder Clinic for an ENG to locate dizziness, and to the Billings Clinic for an EEG for evaluation of seizures. Dr. Reid also prescribed Topamax for headache prevention.

¶ 16 In her July 1, 2009, evaluation, Dr. Reid recommended continuation of therapeutic modalities and included craniosacral therapy and additional medications to assist with headaches. In her October 13, 2009, and February 2, 2010, evaluations, Dr. Reid recommended continuation of previous modalities and medications.

¶ 17 In Dr. Reid's July 7, 2010, evaluation, she discussed Newman's inability to tolerate full-time work due to problems from her injury. Dr. Reid notes that Newman was unable to continue many recommended medications and therapies because she had no insurance and could not afford to try or continue them.

¶ 18 Newman has continued to seek and obtain treatment for her work-related injuries and now has outstanding medical bills.

### DISCUSSION

¶ 19 For summary judgment to be granted, the moving party must establish that no genuine issues of material fact exist and that the moving party is entitled to judgment as a matter of law.<sup>5</sup> In this case, material factual disputes preclude summary disposition.

¶ 20 State Fund's ostensible basis for terminating Newman's benefits is that she had reached MMI. Regarding Newman's MMI status, two distinct conditions remain at

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<sup>5</sup> ARM 24.5.329; *Farmers Union Mut. Ins. Co. v. Horton*, 2003 MT 79, ¶ 10, 315 Mont. 43, 67 P.3d 285.

issue: (1) Newman's neurological dysfunction status, and (2) Newman's neurobehavioral status. I will address each condition separately.

### Newman's Neurological Dysfunction

¶ 21 State Fund terminated Newman's medical benefits by letter dated March 24, 2009. State Fund based its termination upon Dr. Kirk's January 12, 2009, letter which stated: "From the standpoint of the neurological dysfunction, [Newman] has now reached or is near maximal medical improvement."<sup>6</sup> Newman correctly argues that a claimant cannot be simultaneously "at" or "near" MMI. Newman contends, therefore, that the State Fund improperly determined that she was at MMI based on this ambiguous statement.

¶ 22 State Fund agrees that Dr. Kirk's opinion regarding Newman's MMI status presents two mutually exclusive possibilities in that Newman cannot both have reached MMI and be near MMI. It is this ambiguity, however, that State Fund argues constitutes a material issue of fact that precludes summary judgment.

¶ 23 Had Dr. Kirk opined only that Newman was near MMI, Newman's argument would be well-taken. However, that was not the full extent of Dr. Kirk's opinion. Newman asks the Court to focus on only the part of Dr. Kirk's opinion letter in which he opined that Newman was "near" MMI and conclude, as a matter of law, that she could not have been **at** MMI when State Fund terminated her benefits. This would require the Court to disregard the part of Dr. Kirk's opinion in which he opined that Newman "has now reached" MMI. While Newman could not be both simultaneously "at" and "near" MMI, the Court cannot appropriately resolve the ambiguity inherent in Dr. Kirk's opinion letter via summary ruling. The fact that State Fund terminated Newman's benefits without seeking a clarification from Dr. Kirk regarding Newman's MMI status certainly is a legitimate issue to explore at trial in determining whether State Fund's termination was reasonable. It does not, however, provide a basis for summary judgment on the issue of whether Newman was or was not at MMI when her benefits were terminated.

### Newman's Neurobehavioral Status

¶ 24 With respect to her neurobehavioral status, Newman argues that she cannot have been at MMI when State Fund terminated her benefits because Dr. Cory recommended further neurobehavioral treatment and Dr. Kirk endorsed Dr. Cory's recommendations. Noting that MMI can only be achieved when the underlying condition has stabilized to the point that no further material improvement would be

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<sup>6</sup> Letter from Vernon H. Kirk, M.D., to WC State Comp Mutual Fund, January 12, 2009, Affidavit of James G. Hunt, Exhibit B at 4.

reasonably expected from primary medical treatment, Newman contends that she could not have been at MMI regarding her neurobehavioral condition in light of the recommendations for further treatment.

¶ 25 State Fund responds that as to Newman's neurobehavioral condition, it is not established that any further recommended treatment is causally related to her industrial injury. Noting that Newman suffered from "an extensive pre-existing psychological condition," State Fund contends that it is "very difficult to sort out when she reached MMI and if there is any causal relationship between her work-related injury and current treatment needs."<sup>7</sup> State Fund argues: "Under these circumstances, the question of when MMI was reached is best left to the litigation discovery process and questions posed to physicians rather than attorneys attempting to interpret medical records."<sup>8</sup>

¶ 26 Reading Dr. Cory's report in its entirety, indicates that State Fund's lack of causation argument appears a thin reed on which to hang its termination of Newman's benefits relative to her neurobehavioral condition. Dr. Cory's first recommendation states:

Individual psychotherapy is highly recommended on an ongoing basis, and in addition to that provided by her current licensed clinical professional counselor, re-initiation of a DBT-modality coping skills group would appear to be advisable. ***Focus of psychotherapy surrounding her functioning following her concussion should be cognitive-behavioral with regard to the theories of maintenance of post-concussive symptomatology described above; interpersonal and solution-focused with regard to personality and interpersonal dynamics; and psychoeducational with regard to the expected course and outcome of recovery from a mild concussive brain injury.***<sup>9</sup>

¶ 27 Notwithstanding the above recommendation, Dr. Cory's third recommendation reads, in pertinent part: "She [Newman] should be reminded and encouraged frequently that the course of her recovery should eventually be full, including with regard to cognitive functioning, ***if this is not even already the case.***"<sup>10</sup> Taken in the context of the entire report, one might read this statement as a therapeutic recommendation to

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<sup>7</sup> Respondent's Response Brief at 5.

<sup>8</sup> *Id.*

<sup>9</sup> Neuropsychological Evaluation of Jeffrey M. Cory, Ph.D., Exhibit A to Affidavit of James G. Hunt at 22. (Emphasis added.)

<sup>10</sup> *Id.* at 22-23. (Emphasis added.)

address the impact of Newman's neurobehavioral issues on her recovery from her concussion as opposed to a statement regarding MMI. For purposes of summary judgment, however, "[t]he evidence must be viewed in the light most favorable to the nonmoving party, and all reasonable inferences are to be drawn in favor of the party opposing summary judgment."<sup>11</sup> Therefore, summary judgment is not appropriate on this issue.

¶ 28 Summary judgment requires that no genuine issues of material fact exist and the moving party is entitled to judgment as a matter of law.<sup>12</sup> The evidence must be viewed in the light most favorable to the nonmoving party, and all reasonable inferences shall be drawn in favor of the nonmoving party.<sup>13</sup> For the reasons discussed above, this matter is not appropriate for summary disposition.

ORDER

¶ 29 Petitioner's motion for partial summary judgment is **DENIED**.

DATED in Helena, Montana this 17<sup>th</sup> day of May, 2011.

(SEAL)

/s/ JAMES JEREMIAH SHEA  
JUDGE

c: James G. Hunt  
Greg E. Overturf  
Submitted: February 22, 2011

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<sup>11</sup> *In Re Thornton*, 2009 MT 367, ¶ 13, 353 Mont. 252, 220 P.3d 395.

<sup>12</sup> ARM 24.5.329; *Farmers Union Mut. Ins. Co. v. Horton*, 2003 MT 79, ¶ 10, 315 Mont. 43, 67 P.3d 285.

<sup>13</sup> *In Re Thornton*, 2009 MT 367, ¶ 13, 353 Mont. 252, 220 P.3d 395.